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ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

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M E E T I N G

held at

The Frost Building, Queen's Park, Toronto

on

FRIDAY, SEPTEMBER 26, 1969

VERBATIM REPORT OF PROCEEDINGS

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

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Meeting held in the
The Frost Building, Queen's Park, Toronto,
on Friday, September 26, 1969.

Government
Publications

PRESENT:

Mr. H.L. Macdonald (Chairman)

Prof. A. Brady

M E E T I N G

Prof. J. Rennay

held at

The Frost Building, Queen's Park, Toronto

on

Prof. R.C. Harvey

Prof. J. Neisel FRIDAY, SEPTEMBER 26, 1969

Mr. J.H. Ferry

Mr. R.H. Seguin

Mr. A. Carlucci

Mr. D.W. Stevenson Co-Secretary

Mr. E. Greathead

Mr. G. Poole

Miss L. Salford

Mr. P. Libesman

Mrs. S. Wilson

VERBATIM REPORT OF PROCEEDINGS

-----At 9.40 a.m.

THE CHAIRMAN: Sorry to be detained.

There were a few little hang-ups with a certain federal program called Medicare to be attended to.

I would like to welcome you back to our affairs this morning. Dr. Forsey, who intended to be here, I understand is ill.

MR. GREATHEDE: That is right.

THE CHAIRMAN: Also unable to attend are Mr. Callaghan, Donald Creighton, Father Matte, Professor McWhinney - who, I imagine, is very much preoccupied in St. Leonard and other places on his Languages Commission in Quebec; and Professor Symons, from whom I had a somewhat cryptic note yesterday saying that he was taking the day off to celebrate his son's arrival.

PROF. MEISEL: At last!

THE CHAIRMAN: I was not sure whether that was an ex post or an ex ante comment. I thought maybe he was a good forecaster or else his son had already arrived. I don't know.

I am very happy to welcome back - fresh, I am sure, from his sojourn abroad - Craig McIvor. I am not certain about Mr. Gathercole this morning.

MR. STEVENSON: Mr. Chairman, I think, from my recollection, this is the first time the economic sub-committee has outnumbered the constitutional sub-committee.

PROF. FOX: May I suggest, Mr. Chairman,
it is a sign of the times. (Laughter)

MR. PERRY: We are not in a position to
answer this challenge, I don't think.

THE CHAIRMAN: That was the very phrase
on the end of my tongue, Paul, but it got in.

MR. PERRY: Unusual situation.

THE CHAIRMAN: I might say, in case
there is any note of apprehension in your remarks,
Paul, that as far as I know the various lay-offs
for civil servants has not yet been proposed for
the Advisory Committee on Confederation.

The first item is "Opening remarks by the
Chairman". I really do not think I have much to
say in that sense that will not be covered in the
subsequent items or reports.

The work here has been going on, of
course, in the summer interval, with the addition
of some very good summer students, I think, Don
and Ed, who are also helping us.

I think we may come directly to Item 2,
"Report on Developments since June", and ask Mr.
Stevenson and/or Mr. Greathed to comment on that,
including changes in the staff of the Federal-
Provincial Affairs Secretariat.

MR. GREATHED: I will just report on
the fact and introduce to the Committee Miss Lisa
Balfour, who joined us at the beginning of September,

and who is taking the place of Coleen Malone who left us during the summer. Lisa comes to us from Hamilton and is a graduate of the University of Toronto. More particularly, for the last six or seven years she has been working as a journalist for the Globe and Mail and Montreal Star and, most latterly for the last couple of years, was the Southam News Service's chief correspondent in Quebec. We are very happy to have her, and I am sure we shall be getting to know her during the course of the next few years.

I think that is all on the Secretariat.

MR. STEVENSON: Mr. Chairman, there has been relatively little activity in the actual in actual federal-provincial meetings since June 20th.

The "Capital Region of Canada" group has been re-activated, and we met in Ottawa last week and shall be meeting again very shortly.

The main committee of officials on the constitution meets next week for two days in Ottawa.

The official languages sub-committee will meet for two days following that, and during the course of the fall there will be quite a heavy schedule of meetings

There was a meeting of the Federal-Provincial Continuing Committee on Fiscal and Economic Matters in the first week of September

which is filling some of the mandate given to it and the Tax Structure Committee by the Prime Ministers last winter, taking a look at the current problems in the shared cost program field and the more immediate financial outlook.

We had a group this summer working from all eleven governments on projections of revenues and expenditures over the next two years, and all of them are coming to a head at the Tax Structure Committee meeting in November.

Perhaps, Ed, you could give a little bit more of a line-up on -- I guess that is Item 4.

THE CHAIRMAN: Item 4.

MR. STEVENSON: We will leave that for now.

I think one thing I might say about the Secretariat is that its character has been changing over the course of the last few months, I think quite dramatically and in a way that we had very much hoped it would. Increasingly it is taking on the function of a body in the government in a central position to advise other departments in their own operational contacts with the federal government; increasingly, the Secretariat is having a representative along on federal-provincial single-program or multi-program meetings of various sorts. We are getting voluntarily into

the department a great many things that a year or two ago we had to plead for. I think this is a mark of recognition within the government that there must be this kind of role performed if there is going to be any kind of co-ordination of federal-provincial activity.

THE CHAIRMAN: Of a very functional nature.

MR. STEVENSON: Right. It has meant that the staff of the Secretariat is having a harder and harder time keeping its eyes on the constitutional discussions area. On the other hand, it is obtaining a credibility with some of its sister departments that is essential if proposals coming through from the Secretariat are to be generally acceptable through the government.

MR. GREATHEDE: Just in that context, Don, I might just mention -- and the Chairman might want to comment -- that the only major meeting that took place over the course of the summer since the Committee last met was the Premiers' Conference in Quebec City. I do not think there is a great deal to be said about that meeting.

THE CHAIRMAN: The Premiers' Conference was in my view, on balance, highly successful, for some of the very reasons perhaps that certain newspapers suggested it was not. It is true

it did not arrive at any set of hard and firm conclusions about things, but for that very reason it did cover a lot of ground and covered a great deal of exchange of opinion of a helpful nature. Since this is not a joint decision-making body in any event, I think it is a good sign that it did not reach any hard conclusions.

I know that one or two of the Premiers (notably Mr. Thatcher) press very hard for resolutions and formal declarations to come out of the Committee - I think not so much, from his point of view, as a call for action, but rather in the interests of order and tidiness. However, most of the Premiers seemed to feel that this is not necessary; that the real merit there is the opportunity to compare notes and, in the fast-changing scene, to know one another.

For example, just two weeks after the new Premier of Manitoba was sworn into office, there he had right away an opportunity to sit down with his fellow Premiers, which I am sure has to be extremely valuable.

There was not the concentration on the federal government that there was a year ago; there was not the series of requests going forward to the federal government. However, there was a good deal of determination on a number of areas, notably pollution. I think we have turned the corner on pollution, certainly in this province

and some of the other larger provinces, as recent policies would indicate.

The other big area of discussion was urban problems, and here there was certain discussion about the federal government. I think of all the gray areas that we are dealing with in functional federalism, this one is both the most difficult and the most important: the federal government trying to find (because it is under political pressure to find) ways of contributing to the solution of the problems; and the provinces (in my diagnosis) in dealing with the urban problems, bringing into focus all the problems that a provincial government faces in internal co-ordination. This brings together transportation, educational spending, reform of local government; brings together all of those things which are boiling in the pot at the present time. So it is one area that I think it is difficult for any government to deal with all at once.

I thought that conference was a good one, although I must say that I am slightly handicapped in that although I sat through all the proceedings, I can only tell you about ten per cent of what went on. This is because it took place in the Legislative Chamber, where the Premiers sat around a table on the floor and the

advisers sat at Members' desks, and where the acoustics were such that you could hear nothing that came from the people whose backs were to you, and about fifteen per cent of what was said opposite, so that there was a certain intuitive process at work. However, I think it was quite a good discussion.

PROF. FOX: Just as a matter of historical interest, is there any record kept of the discussions at these Premiers' Conferences?

THE CHAIRMAN: Yes, but the thoroughness of it varies. When we met in Toronto in 1966 there was a complete verbatim transcript, and I think we have two volumes in our possession about this thick of everything that was said. In other instances -- last year there was a summary resumé prepared. This year a chap was taking a verbatim record, and I suspect that too will be available. I think for most of them there are quite thorough archives on them, although they have never been made public, of course, in any way.

PROF. MEISEL: Is there any provision for the ultimate placing of these records in storage?

THE CHAIRMAN: No, it is an interesting point.

PROF. MEISEL: There should be.

THE CHAIRMAN: It is something we might ponder, both with respect to that and with respect to the federal-provincial conferences.

DEAN LEDERMAN: You could deposit them with the editorial staff of the Globe and Mail

-----Laughter.

MR. PERRY: Probably already have them.

THE CHAIRMAN: They seem to be becoming increasingly ill-tempered on that subject, and I felt it would be terrible to contribute to the great disillusionment they had experienced by letting them see what went on in some of these high-powered sessions.

PROF. FOX: Seriously, I would like to second John's suggestion, and perhaps you might raise the point ----

THE CHAIRMAN: Yes.

PROF. FOX: -- of these being preserved, even if a time is put on their disclosure.

THE CHAIRMAN: The federal-provincial conferences too. It is a good point. I don't know that anybody has thought about systematic storage.

MR. GREATED: Internally, of course, we have been much more concerned over the last few years with the management of public records and the deposit of many of them in the archives,

and they are attempting to be much more systematic about this. On this particular point it is well worth making sure that they have.

PROF. MEISEL: While we are on this, I wonder if I could make another comment. I know it is not the function of this Committee to serve scholars, but it seems to me it is in the long-term public interest of everyone that the way in which decisions in the public sector are made is fully understood. In the long run, I think it would be very important for historians and others to have access not only to the final documents that emerge from all these deliberations, but the successive drafts. I think the working papers of, say, our own bureaucrats here and others should ultimately be deposited in an archive. I do not imagine this will be done in the next ten, fifteen or twenty years even, but ultimately it should. I think these papers should find their way into a safe place - all the doodles of the Chairman!

THE CHAIRMAN: I just received yesterday a report on this in terms of this whole department. You know, our work started from the ground up, and we have not been deficient in producing papers and material. You suddenly reach a point when you realize the thing is almost out of control.

For the last four months I have had

people whose profession is in what is known as "records management work", and I had a report in yesterday (which I am going to approve) which will institute a whole records management procedure right in the department and in relation to our provincial archives and everything else. I think we are really going to get on top of this. I do agree it is very important, and we will make a point of going into this in the context of the other conferences.

MR. PERRY: Ian, if we could switch to the sublime after all this pedestrian exercise --

THE CHAIRMAN: That's not a very nice way of putting it, Harvey!

MR. PERRY: I think you will get the point of my remark when I make it.

Is there any indication of changing or developing moods among the provincial governments of the country as a result of your exercise over the summer? By sheer accident, I seem to have been in Montreal and Quebec City two or three days a week all summer long, and I got very conflicting stories as to the control Mr. Bertrand has over his cabinet, which may at this point be non-existent.

THE CHAIRMAN: You certainly arrange your accidents in a most propitious manner.

MR. PERRY: I wanted to get you into

a troublesome area!

THE CHAIRMAN: I don't know, Harvey. It is a big question. I think in many ways the one feeling I would have personally is that the atmosphere is a lot more settled on the general federal-provincial front: mainly because I think the federal government is secure and being well managed and being orderly about the way it is going about things.

Secondly, I feel - and this is not just my view but the view of our political people who have commented in this way - that in many respects the Quebec scene is also more secure at the governmental level, where Mr. Bertrand would appear to be in a much stronger position internally. I say "at the governmental level" because I do not presume that the underlying Quebec society in quality is any less settled.

As far as I can judge, all the Maritime provinces are taking quite seriously their examination of the Maritime union business, from which I would say that if full union does not emerge I would not be surprised if a good deal of collaborative machinery emerged to do certain things as of one.

The western Premiers, I think, are still as anxious as ever and manifesting feelings

about isolation from certain programs and certain policy. Undoubtedly, Mr. Bennett is more secure than ever, so that I think we can expect to hear the interesting positions which he postulates from time to time put forward even more clearly and more firmly. I think he has made some very interesting suggestions. The approach he is taking to equalisation and the guaranteed income proposals, whether one agrees with it or not, certainly has a real thrust in it in seizing on it, coming to grips with it - I think a very useful contribution.

MR. PERRY: I think he is almost redeeming himself.

THE CHAIRMAN: For years of fatuousness?

MR. STEVENSON: You mentioned you had received conflicting reports in Quebec. Of course, to give you a conflicting one, so do we: that rather than perhaps stability, one sometimes gets the impression over the last few months there has been more of a drift and vague uneasiness, much along the line that you suggested; that a lot of people within the government or around government circles there, I suppose, would not necessarily regard Mr. Bertrand's position as being a strong one but just that he is not there for all that long; that there are some fairly

big developments presumably on the horizon, a big leadership campaign in the Liberal Party coming up, a major Partie Quebecois convention this fall. The defection of Parizeau, of course, will lend a little credibility in this situation.

MR. PERRY: That has been coming for some time.

MR. STEVENSON: Right, but I do not think it is all that stable necessarily in the contacts I have been having recently. There is not so much overt problem-raising as there has been over the last two or three years by any means.

DEAN LEDERMAN: The political situation in Quebec, would it be a proper comment to say there has been a fragmentation, that is more in fragments than it was a year ago?

THE CHAIRMAN: Well, I made a distinction between government and the outside, and Don was saying there may be more uncertainty within the government than I indicated, but I was really --

MR. PERRY: Excuse me, Ian. I would like to support that. One of their senior advisers (whose name you know) talked to me earlier this week, and he said this Cardinal-Bertrand split covers every issue: it is right down the middle.

THE CHAIRMAN: I base my comments on two conversations really. One was over an hour one night, walking up and down the Dufferin Terrace there with Mr. Bertrand, and he spoke quite frankly about his own position in the government. I was left with the impression of a man who felt genuinely in command of the ship; just from the way he spoke and the "chemical" feeling he seemed to express, I felt that he was a man who, while surely he had plenty of problems, felt in command of the ship. That was the one thing.

The other thing was a long conversation with the new Minister of Finance, who impressed me considerably, who, I felt, was a very "no nonsense" and sensible person, who was very much behind Bertrand and who would give Bertrand something that perhaps no Premier in Quebec has had in the last ten years: that is, both a sensible and a sensitive Minister of Finance, a man who is hard-headed about dollars and cents (as Dozois was) and who also knows what economic policy is, knows what the modern technological apparatus is about and who seemed to be very much with it.

Whether that is a wide enough universe to draw a general conclusion from, I do not know,

but that is just the feeling I was given.

MR. PERRY: I would support that with another. I recently had about an hour's talk with the new Minister of Justice, Remi Paul, about crime in Quebec, because banks are among the main victims of this, and he is seriously dedicated to making drastic changes in their administration of justice and several other things. This situation has almost got out of hand; it is almost like Chicago in the 1930's. I was very much impressed with his decisiveness and his courage. This is not an easy task he has. About the last job in the world I would want would be Minister of Justice in Quebec. He spoke as though he had the Prime Minister's support on this, and they were going to go ahead and do some pretty rough things.

THE CHAIRMAN: He is another very good man, I think.

MR. PERRY: Yes. So you get that kind of thing happening, and yet pretty clear signs that there is a big division in the cabinet

PROF. McIVOR: Who is the new Minister of Finance?

THE CHAIRMAN: Mario Beaulieu.

PROF. FOX: You know why he is so sensible: he is a Franco-Ontarian.

MR. SEGUIN: You mean he has learned his lesson?

MR. STEVENSON: He knows what "sensible" means.

PROF. FOX: In a broader context, would it be fair to say -- continuing your answer to Harvey's question, that there is a pretty general feeling of retrenchment and contraction on the part of provincial governments, as at Ottawa? In other words, the glow is really off the constant expansion, and that we are now facing a period in which there is going to have to be pretty severe restriction on the totality of government expenditures, and that this has been pretty well accepted as a consequence in a way that it has not been accepted in the last ten years, this assuming of constant expansion in almost every area?

THE CHAIRMAN: Yes, I think the general muscle-flexing has been slowed down by the shock that everyone has had in realizing the (rightly or wrongly) crisis of government expenditures. It has been accepted that the federal government is not going to give up anything/that they have made their public pitch on this too in terms of controlling expenditures. The provinces have faced the same problem. So really everyone has had his horizons limited

I hope that does not result in taking some of the creative quality out of both government and inter-governmental affairs. I hope we can retain some sensible balance in it. I do not think it is particularly healthy for everyone to go around with a face a mile long for too long.

MR. STEVENSON: One thing that I think has come up is that Mr. Bertrand is very conscious of and putting a lot of eggs into this constitutional discussions basket, and that he has been saying to a number of people inside Quebec: "I believe that these are going to produce".

I am very happy with the attitudes shown by some of our sister provinces, and the fact that the federal government is really beginning to look at it seriously. I think we should do all we can to keep the lid on until the constitutional discussions do have a chance to produce something that will provide the kind of framework for Quebec that a lot of people in Quebec have been looking for; but I think I would put the caution to that, that if the increased serenity of the past few months has the impact of taking the pressure off all the other governments on the constitutional discussions, we then have a very rough position in Quebec. I say this because I think Bertrand's position requires

that there be evidence of progress and real change at pretty regular intervals.

PROF. BRADY: Do you get an impression as to what order of priority there is in the implementing of proposals of constitutional change? Does the Quebec Government still stand by the brief of its officials last year?

MR. POSEN: I think the answer to that is generally "Yes". In Premier Bertrand's report to the Quebec National Assembly after the June conference, he stated to the Assembly that their position was still based on this set of papers that have been presented to the conference.

PROF. MEISEL: They could hardly have publicly repudiated them.

MR. POSEN: Right.

PROF. MEISEL: So it is really a question of what in fact Bertrand thinks he must have.

THE CHAIRMAN: Certainly they are as vigorous as ever in the constitutional officials' meetings, Don, are they not, about the specific position they have taken and their adherence to it?

MR. STEVENSON: I think so. They do not perhaps have to repeat it quite as often as they have, because it has been laid out on the

table; but I remember a year ago in the distribution of powers it was the social security area, the international affairs.

MR. GREATHEDE: C.T.V. or educational

MR. STEVENSON: Communications generally. Social security is going to be taken up before the end of this fall as a major item for discussion, so I think they will certainly be pressing very hard on that score. Obviously I think there is big change in the wind in this area because the whole federal White Paper on Taxation is bound to be tied in. Discussions about income maintenance programs are as much program worries as constitutional areas right now.

PROF. BRADY: On the official level you have not really come to grips yet with the proper distribution of powers.

MR. STEVENSON: Not with the tough issues of Quebec, no.

THE CHAIRMAN: I wonder, Harvey, if you have any view on this? There are, again, two illustrations of the Quebec concern with the economic as opposed to the constitutional; and that is, first of all the establishment of this General Council of Industry (as I think it is called) as a senior advisory body of influential industry and business people; secondly, the new

Consultative Committee which the Minister of Finance has appointed to advise him on a broad range of subjects that really go right into the heart of internal policy-making in the financial field.

Have you gathered any reaction in Quebec as to the seriousness of purpose that these bodies have?

MR. PERRY: One of my own men is on that second committee, André Bisson, Director of Education in Montreal, and he is very much impressed with this new Minister. I have described the functioning of this Committee to him, and I think he can see it operating in somewhat the same way, although it is rather a mixed group there. I think there are four ministers, four officials and four, five or six outside people. So far they have only had two or three meetings, and it has been largely informative. He thinks it will break down into smaller task forces who will be given fairly selective subjects on which the Minister will simply ask their best opinion. They get the feeling from their meetings that they will value this outside sort of contact. Marcel Boulanger, of course, who is also a member, is very cynical about it.

THE CHAIRMAN: He has been around

there too long.

MR. PERRY: Too long, yes.

THE CHAIRMAN: There are two other points I might just mention before we conclude this commentary on recent events.

One is the fact that during the summer Mr. Ed Gallant, who is the Secretary and permanent head of the Secretariat to the Constitutional Conference in Ottawa, was woo-ed back into the Privy Council Office, back in the federal service, where he now is. He was replaced by a gentleman called Henry Davis, whose background was simply Department of External Affairs for a number of years.

That change has taken place, and Mr. Davis has been to visit the provinces over the past few weeks, and we shall be meeting with him at the first meeting since he has been in that office next week.

The second thing is, I wonder can we get copies of the Burns' report?

MR. STEVENSON: I was just suggesting that to Ed, and I think we should. I can send that around.

THE CHAIRMAN: The Burns report, as you know, is a study that was commissioned by the Department of Finance with the enthusiastic support of the Continuing Committee on Financial and Economic Matters, to deal with inter-governmental

machinery principally in the financial side though it has a lot of implications for other areas.

A funny thing happened in the light of the publication of that report, it would appear, because Ron Burns - who is one of those who, I think, by his own conviction and by letters to newspapers and other ways, has expressed himself very strongly against certain things - now seems to be getting "taken over the coals" for those very things. Certainly a couple of *Globe & Mail* editorials were in that form.

MR. PERRY: Better ask someone up from there to lunch some time. They just seem to be going sour.

DEAN LEDERMAN: His theory is they did not read the main report, but it is available from the Queen's Printer as I understand.

MR. GREATHEDE: That is right.

THE CHAIRMAN: If members of the Committee would like one -----

PROF. FOX: I would like one.

THE CHAIRMAN: -- we would be happy to secure one and make it available to you.

PROF. FOX: Mr. Chairman, on that point, while you are raising the Federal-Provincial Secretariat, could I ask, as a point of information, whether or not the provincial presence in the

Secretariat has been increased? In other words, are there more provincial civil servants serving on the Secretariat?

MR. GREATED: In the past there have been only two provinces which have assisted in this way to date, and they have been New Brunswick and Ontario. I suppose the difficulty has been that most governments probably have staffs that are too small in this area to let someone go for an extended period.

However, I know we have been very anxious - both from the matter of our own intelligence and because of our belief in the joint nature of the exercise - to have someone there; and I hope we will, over the course of the fall and the spring, have someone seconded there for a period varying from two to three months maybe at any given point.

Henry Davis, the secretary, is very anxious to have people of that kind.

I might add that Ontario is, to the best of my knowledge, the only province which has made a financial contribution to the expenses of the Secretariat, but I think the hope is that other provinces will do the same as its inter-governmental character is more evident.

DEAN LEDERMAN: Mr. Chairman, my impression of the transfer of Mr. Gallant was that

it was a good sign, because he moved into the federal government in charge of the organization there that corresponds to your federal-provincial secretariat here.

THE CHAIRMAN: Right.

DEAN LEDERMAN: And I thought that was a very good sign, that they were at last really co-ordinating, and they had put in a man who had had extensive experience with the provinces.

MR. GREATEHD: Right.

THE CHAIRMAN: We had mixed feelings. We were sorry to see him leave the office, but it is quite right, I think, that he would be in a position to do a very good service to the provinces and to represent their view within the federal government.

As you know, in the Privy Council Office there is the Deputy Minister, Mr. Robertson, and there are three Deputy Clerks - one on operations, one on planning, and now Mr. Gallant in charge of federal-provincial matters and under him in turn are two streams. One of those is under Professor Strayer doing the work on the constitutional review, and the other under Mr. Carter on ongoing federal-provincial relationships.

DEAN LEDERMAN: In a word, I think it was a real step forward for co-operative federalism.

THE CHAIRMAN: May we go on to Item 3 and we will have a brief report from the staff on the second volume of O.A.C.C. papers.

MR. GREATHEDE: Mr. Chairman, just to keep the Committee abreast of this particular matter, I would say that the editing and the proof-reading and the general carrying through to production of the volume, is now in the hands of an editor, Miss Christine Purden, who has had a fair bit of experience in this kind of work. She is now undertaking the initial editorial work, and she expects to complete it in about six weeks time.

I want to emphasize that any manuscripts will be sent to the individual authors before they are sent to the printers for publication.

THE CHAIRMAN: Where is she?

MR. GREATHEDE: She is in Toronto; has her own firm. She used to work for Newtons, and she now has her own firm, Christine Purden Associates.

This is thanks really to a very helpful suggestion from John Meisel, and as we discussed briefly, I think, at the June meeting: that we were going to find ourselves very, very hard pressed indeed if we had to undertake this rather detailed task. However, we are keeping a very

close weather eye on the whole production, and Gary Posen has been closely in touch with Miss Purden in the course of the exercise.

In addition to the list which you previously saw, we are very grateful to have Professor Lederman's paper, which I trust everyone received - except, I think, Professor Lederman - in the course of some of the papers which we sent out over my letter of September 17th.

I think, in talking to Miss Purden and looking at the problems associated with the manuscripts, we have had to be a little more realistic about publication date. We are conscious of the desire to catch the Christmas tree, but I think, more realistically, we are thinking now -----

THE CHAIRMAN: Of the Easter bunny.

MR. GREATHEDE: The Easter bunny, or even, for penance purposes, we may get it out just before Lent. I think maybe it will be in terms of February; I am hoping. I think Christmas would be simply too early.

PROF. MEISEL: April first.

MR. GREATHEDE: That is all on that subject from me, Mr. Chairman.

THE CHAIRMAN: As long as it is not a Valentine's Day massacre. (Laughter)
We are having a lot of trouble with one delinquent

contributor, and I think he he just doesn't hurry up and get things going, we should cut him off at a certain date.

PROF. MEISEL: Is that the editor?

THE CHAIRMAN: That is the Chairman of this Committee!

MR. GREATHEDE: I refrain from speaking of delinquents. Everybody sure works their best.

THE CHAIRMAN: We will do our best with that.

Now: "Report of Fall Program of Inter-Governmental Constitutional Meetings".

MR. GREATHEDE: Again, Mr. Chairman, Don spoke initially of some of the program that we are confronted with. I think it is within our nature to be optimistic and cheerful all the time, although the program we are faced with between now and the meeting of the Prime Ministers - which I think is pretty well settled for December 8th to 10th.

THE CHAIRMAN: Yes.

MR. GREATHEDE: I think between now and then we are going to have a very heavy program indeed, both in terms of the physical demands of getting around to various places and meeting and so on and reading all the material, and also in terms of vast number of meetings which are now

being scheduled .

As Don mentioned, the first in this series will be next week, when we shall be in Ottawa for a couple of days - the eighth meeting of the Continuing Committee of Officials; which will be followed by a one-day meeting of the sub-committee on official languages; and later in October and early in November, the ministerial meetings (which you will recall had their first meetings in May) will again be convening.

We have really only had tentative dates on a couple of those committees, but I think the hope is certainly that by the end of the first week, or possibly in the middle of the second week in November, those ministerial meetings will have taken place and will be in a position to report in much more detail than they were able to do in June, to their Prime Ministers on their progress.

As you recall from the June communique, the Prime Ministers specifically asked these ministerial committees to give them substantial accounts of their work, and I think this will encourage these particular groups to come up with some more substantial conclusions than they were able to do as a result of their first meetings.

Following that, I would think in the week of November 10th or so, the Continuing Committee

of Officials will meet for the second time and, I presume, the last time before the December conference; at which time they will try to complete the remainder of their agenda and prepare whatever kind of report they are going to give to the Prime Ministers in December.

That is all quite apart from the internal work which each of the governments will have to do, and I think, as you can probably see, it is a fairly heavy schedule.

I might just say that next week in Ottawa we are going to be discussing primarily some of the subjects which came out of the instructions from the Prime Ministers in June, starting off with the taxing powers, going into the formula for the spending powers, having some consideration of the constitutional aspects of regional disparities; and then looking at a variety of administrative questions such as the review process itself, the role of the Secretariat and so on, preparations for the December meeting which we will have to consider at this stage.

It is for this reason that we are particularly anxious, I think, to-day to have your comments on the revised formula that you received in draft form some time ago, as well as the brief paper on constitutional aspects of regional disparities.

I think that is all, Mr. Chairman.

THE CHAIRMAN: Any questions about the observations on the timetable?

MR. STEVENSON: There is a parallel set of financial discussions going on too.

THE CHAIRMAN: Yes.

MR. GREATHED: That is true.

THE CHAIRMAN: At which the White Paper will appear - White Paper may appear.

MR. GREATHED: Quite apart from the many, many inter-governmental meetings that are going on, Continuing Committees and so forth.

PROF. FOX: Will the December meeting of the Federal-Provincial Conference be open or closed, Mr. Chairman? Has it been decided yet?

THE CHAIRMAN: It is still under discussion among the Prime Ministers and Premiers. I think the likely outcome according to present thinking or suggestions, is that the first two days might be closed, and then the third day be open -- with the following advantages, that it was felt that opening on the first day is always a total loss because everyone recites their general position to the nation, whereas if we had two good working days, by the third day it might be in a position to discuss together and openly what had been going on and where they had arrived, what their differences were and so on.

At the two extremes, I think there are still some who are moving in the direction of thinking that this is hypocritical, that if you have gone that far you might as well have it all open; and others who are extremely apprehensive about openness at all.

I do not know how it will come out. It is going back and forth right now.

PROF. FOX: It is going to meet in Victoria though?

THE CHAIRMAN: No, in Ottawa.

PROF. FOX: What happened to the Victoria idea?

THE CHAIRMAN: That is for 1971. As the Premiers' Conferences are scheduled, they are going to Manitoba next year because of the hundred year celebration there, and the following year to Victoria for the same reason. Also in that 1971 year it was agreed that one of the federal-provincial meetings would be held in Victoria.

On top of all of this, there was a related matter. We mentioned the constitutional. There is the financial, and it will be under the same umbrella. On top of all of this, another matter which is going to be quite a significant issue in federal-provincial affairs is the proposal that the Prices and Income Commission may have a

giant meeting in the first week of December, at which they would hope to have the Premiers of the provinces, or at least the Finance Ministers present, because they are discussing right now fairly heady matters of control, a large number of which fall under provincial jurisdiction -- rent control, control over professional fees schedules, the provincial government sector itself, the public utilities such as Hydro (Mr. Chairman!) and other areas. All of these things are such that they can only be done by provincial governments, so that the inter-governmental aspects of any matters to do with price or cost regulation will also be coming up. That is why we say it is quite a little season ahead.

Then, of course, on top of that, here our own Legislature resumes next Tuesday, having sat from the third week of January to the end of June and only gone through seven of twenty-two departments (and those some of the smaller ones) hopes to complete the Estimates for the rest of them before Christmas. Other governments are in the same boat.

It almost adds up (it is an interesting point) to a plate that is too full to be managed by the same group of people that are essentially doing this. It is quite a serious problem.

MR. PERRY: It is coming up all over the place; it is coming up in business. There is just too much to be done. I think we are going to have to take six months holiday.

MR. GREATED: Hear, hear!

MR. PERRY: And let these problems just look after themselves for a while.

PROF. FOX: It is a bit like the N.H.L. schedule.

MR. GREATED: Franchises are very expensive.

THE CHAIRMAN: I hope the carnage is not as great! (Laughter)

DEAN LEDERMAN: It just goes on and on.

THE CHAIRMAN: One talks about the pace of these events. These ministerial meetings, for example, which were held in May and will be held again in November. The constitutional conference met in February and will meet again in December. It seems virtually impossible to do any more than two sessions a year, to accommodate that to everything else.

I think Mr. Robarts was right, when this all began a couple of years ago, and he said "We might just as well make up our minds we are sitting down for a long, long haul on this" and it may well be five or ten years or whatever.

DEAN LEDERMAN: This may save the country in the end.

THE CHAIRMAN: You just keep going. We are ready now, I think, for the main business, which is to have quite an extensive examination of the various draft papers which we have prepared. These are first drafts. They are the product of some of our thinking and work during the summer. Now we really need your advice and criticism and review.

It might be convenient for us to have a little break at this point and take coffee, and then go right on with these papers.

PROF. FOX: Which one do you want to start with?

THE CHAIRMAN: What would you say?

MR. GREATHEDE: I would appreciate if you start off with "The Alternative Formula for Reaching National Consensus on the Spending Power"; move to the question of the constitutional aspects of regional disparities; thirdly, look at the paper entitled "The Charter of Fundamental Rights for Canada"; and, if we have time, go into the Court paper which is a little longer. It may be, Mr. Chairman, that if we do not have time towards the end of the day, we might have to reconvene our task force on that question and ask them to go over it a little more leisurely and in a little more detail and report back to the whole Committee. If that is convenient to you,

I think this would be best from our point of view.

THE CHAIRMAN: All right. Shall we take five or ten minutes and have a cup of coffee, and then get back to work?

-----Short recess.

THE CHAIRMAN: Ed, would you introduce us to the first paper, please?

MR. GREATHEDE: Yes, be glad to, Mr. Chairman. The genesis of this particular paper, I think, can be found in the instructions which coming we received in the communique/out of the June meeting. I might just quote that particular paragraph which the Prime Ministers issued, because I think it is relevant to this particular proposal.

They said, in the report on the spending power discussions:-

"With respect to the formula for determining the consensus, there was agreement that the Parliament of Canada and the provincial legislatures would be the appropriate bodies to determine whether a consensus exists, and there was general agreement that the formula should reflect the regional character of the country. However, one province stated that while it agreed with the principle of establishing a consensus, it considered that the formula for amending the constitution

"might well provide the basis for reaching
"consensus.

"It was further agreed that the Continuing
"Committee of Officials should look again
"at alternative formulae."

What we were faced with, essentially, was that, as members will recall, we had two proposals at the time of the June conference on the spending power. One was from the federal government; the other from Ontario. I suppose one erred on the side of complexity, and the other on the side of excessive simplicity. So we were faced with the prospect of trying to find a formula which took into account both of the original suggestions; at the same time keeping in mind some of the comments or complaints that had been made with respect to the regional balance in the country.

The specifics of the formula that you have in front of you, in terms of the assigned paper work arrived at and so on: it was partly by a process of osmosis, but also in part (and more seriously) we had been giving consideration to this in the course of our examination of the Senate. Indeed this formula or a variation of it, if it stands the test of this Committee's scrutiny and the test of the scrutiny of the Continuing Committee and further up the line, may well be used to apply to the question

of Senate reform.

I think that is really all on that particular paper, Mr. Chairman. As you indicated earlier, we would be very grateful to this Committee for their comments and observations.

THE CHAIRMAN: When you get into this kind of exercise, it certainly becomes a little esoteric. It is interesting to know how far one can put essentially a problem of high politics into a formula; but we set out on this route and there have been other such suggestions, and I think we have really got to do our best to come up with something sensible and acceptable.

This is a starter.

PROF. FOX: The first comment, Mr. Chairman: I suggest we change "Maritimes" to "Atlantic".

MR. GREATHEDE: "Atlantic"; not "Atlantis"!

PROF. FOX: It might be. It all depends to what extent Newfoundland enters in.

PROF. McIVOR: One other marginal comment, Mr. Chairman. The title of this paper seems to be somewhat broader than the actual subject matter. It is consensus on shared cost programs. It does not extend beyond that, does it?

MR. GREATHEDE: No, not really.

DEAN LEDERMAN: I think it applies only to the federal paper on the subject, which reads "areas which it is agreed are exclusively

under provincial jurisdiction"; and every word counts, I think, in that.

THE CHAIRMAN: Yes. I think we had best be very, very explicit.

PROF. McIVOR: The title might more clearly indicate what the subject is.

THE CHAIRMAN: Yes. Does not the federal paper on spending power, as you say, in fact deal with that aspect of the spending power which is manifest through these programs? I think, if I recall, their paper is called something, in effect, to do with shared programs, is it not? Can someone remind me of that?

DEAN LEDERMAN: I think they deal with the whole of the spending power, but they recommend that it remain unqualified "except"; and the only place they are proposing to apply the formula is areas where it is agreed that the jurisdiction is exclusively provincial.

MR. STEVENSON: As Professor Lederman says, the form of the federal paper reads:-

"The power of Parliament to make general conditional grants in respect of federal-provincial programs which are acknowledged to be within exclusive provincial jurisdiction should be based on two requirements: first, the broad national consensus and, secondly, the decision of provincial

"legislature to exercise its constitutional
"right not to participate in any program,
"even given a national consensus, should
"not result in fiscal penalties being
"imposed on the people of that province."

There is no question this is only relating to one
particular ----

PROF. McIVOR: So this is consensus
on shared cost programs related to areas of
exclusive provincial jurisdiction.

MR. STEVENSON: Right.

PROF. BRADY: Mr. Chairman, I would
like to draw attention to one point on paragraph
3, the last sentence in the paragraph:-

"This formula was criticized because
"Ontario alone, with 35 per cent of
"Canada's population at present,
"could conceivably in the future have
"a veto over any proposed shared cost
"program."

That was a condition on what follows it, I think.
But, of course, the formula could be re-examined
periodically, could it not, with population growth
and so on, and altered. Was that matter con-
sidered?

PROF. MEISEL: In fact that could be
written in by saying that if evera province does
reach veto power strength, the formula can be

re-examined or must be re-examined.

PROF. BRADY: Yes, or you could write in "Have it re-examined at specific intervals.

PROF. MEISEL: Could be tied to the census.

MR. PERRY: Just on another point, it looks as though the Canada formula was by regions. The Ontario formula was by provinces. What are we looking at now in the new proposal? Is it by regions or provinces?

MR. GREATHEDE: It is a combination of both.

MR. STEVENSON: Basically regions.

MR. GREATHEDE: But basically regions.

MR. PERRY: What does that mean now? In the Atlantic provinces, for example, does there have to be a majority vote in one direction within that area before they count for seven?

PROF. MEISEL: Does the unit rule apply?

MR. PERRY: Yes.

MR. POSEN: No, in that context it is not regional. In the federal one there were four blocks voted. Here it is adding up the individual provinces.

MR. PERRY: So that in a sense the regional aspect of this is irrelevant: it just proves you can add up to seven as far as I am concerned.

MR. POSEN: The only way - we had written

in the one situation where either the Maritimes or the Prairies vote negatively as a block, that the weighting rule would relate there, and they would be given a veto just because one entire region had voted against - three or four governments had banded together to vote against something and sort of did away with the national consensus.

MR. PERRY: But generally we are looking at a provincial weighting?

MR. POSEN: Right.

MR. PERRY: Provincial weighting system.

THE CHAIRMAN: I am not sure: did we answer Professor Brady's point properly or follow it on?

MR. GREATHEDE: I made a note of that, Mr. Chairman.

MR. POSEN: Mr. Chairman, the difficulty, I guess, with that system is the day that Ontario has forty per cent of the population it has an absolute veto. Well, you move it up to 65 per cent of the population that is required to have a consensus, and that means Ontario and one other province (Saskatchewan or Manitoba).

The complaint from the other provinces and the federal government is that you have to take the population percentage up fairly high in order to make it at all meaningful. If you

said 65, Ontario and almost any other.

MR. GATHERCOLE: Would you not question the logic of B.C. more than Alberta, and Alberta at the same time more than Saskatchewan and Manitoba /does not give Ontario greater weight than the Province of Quebec, Ontario having a million and a half more people?

PROF. McIVOR: I think it is an exceedingly ill-advised move to try to bring logic into this consideration. It is obviously a "numbers" game related to the art of the possible.

I was going to ask, as to the bottom of page 2 there, if there has not been an omission in the first line, that:-

"It should be noted that while these "weights are based on the ignoring of "population differences." (Laughter)

It seems to me that population is of purely marginal importance in this whole exercise, and contributes very little to developing any rational basis by bringing population into the discussion.

THE CHAIRMAN: You are quite right. It really is a way of trying to get around the logic of the population, and could lead you to a politically unacceptable position.

MR. GATHERCOLE: I was going to ask whether there is any prospect of a formula of

this kind being adopted. It is perhaps not only being not logical, but also sort of theoretical, unreal. But I do not know. I am out of touch.

MR. GREATHEDE: You may be perfectly correct. The problem we have, of course, is that I think the original federal proposal was pretty roundly condemned, at least at the officials level, because of the particularly traditional Senate provisions that they employ.

Equal reservations were applied to our initial proposal, because of the great weight it would give Ontario in these particular matters.

Therefore, it was just a question of: "Could we start afresh and come up with a different basis?" There is a large theoretical component here, large area of decision for politicians. I do not know. If there is another way to skin the cat, I would be very happy to have the Committee---

MR. STEVENSON: My first thought was to move to 65 if people complained too much about Ontario; but that does not bring in any regional component.

MR. GREATHEDE: No, and the communique specifically instructed us to consider that question.

THE CHAIRMAN: On the third page we say in our formula:-

"In practical terms this means that "any combination of two of Ontario, Quebec and British Columbia, i.e. Ontario and

"Quebec, Ontario and British Columbia,
"or Quebec and British Columbia, could
"veto a program."

Then under the earlier Ontario proposal, in one of the combinations, etc., this is only less restrictive in the sense that it rules out the Ontario-Alberta combination. Is that the only difference?

MR. POSEN: Yes. Again, it depends on the exact population statistics. It is getting pretty close where Manitoba and Saskatchewan in conjunction with Ontario would total forty per cent.

MR. GATHERCOLE: What is wrong with that? After all, they represent a very sizeable proportion of the population. I think it would be possible to devise a formula that would place Ontario in a position in which it did not exercise the weight and the influence that it should. That would be a thing on which I would be apprehensive.

PROF. FOX: What is the premise on which one enters into these discussions? Is it to achieve a national consensus, or is it to protect Ontario's advantage? Have you clarified what your basic role is?

THE CHAIRMAN: I think it is a very important question, Paul.

PROF. FOX: Because if it is a bargaining situation, then I would support George: bargain from the strongest position you can and you probably settle for something less; but if, on the other hand, if you feel it is possible, by the degree of consensus that has already been expressed in your meetings to date, to make an arrangement that more or less keeps everybody happy, you begin from a slightly different consideration which might be quite important. I agree you should not give away too much if you feel it is so important.

MR. GATHERCOLE: The difficulty as I see it in adopting these various formulas -- I don't think there is very much prospect of adoption of a formula of this kind; but the difficulty in a formula of this kind as devised and applied is that this sets a precedent for launching off in all other directions, and the first thing you know you have surrendered some authority with a view to trying to be co-operative, and at the same time you are getting into matters of -er much great/significance.

PROF. FOX: I think that is right, Mr. Chairman. It might well be picked up by people who were contemplating methods of amending the constitution, as a formula to apply there in substitution for the proposed formula in the Fulton-Favreau.

MR. GREATHEDE: I suppose the dilemma which Messrs. Gathercole and Fox point out is one we are constantly confronted with in this whole exercise. I don't know that there is any particular answer to this. I suppose it is the emphasis that the Prime Minister of Ontario gives to his instructions from time to time.

DEAN LEDERMAN: Is it not one of the basic assumptions of federalism, if it is to be a federal country at all, that the less populous provinces are going to have an influence that is out of proportion to their population, and that the more populous provinces are going to have an influence that is less? If you want representation by population right the way through, you are finished with federalism.

PROF. MEISEL: Yes, and that is only part of the story really, because in effect if you distinguish between formal influence and informal influence you really compensate on the formal side for the overwhelming preponderance on the informal side of the more powerful areas. So in effect this is a kind of fair equalization principle that you build into this.

I think a province like Ontario in so many of these areas, can afford to accept some of these formal restrictions because it is so powerful in other terms.

DEAN LEDERMAN: Ontario has to pay a price for federalism.

MR. POSEN: Another consideration, of course, is that this is considering the federal spending power with regard to shared-cost programs in areas of exclusive provincial jurisdiction.

DEAN LEDERMAN: Yes.

MR. POSEN: Up to now the provinces have had no way, aside from a political way, of preventing federal initiative in this area. Of course, the whole idea of introducing a formula was to give them a formal way of arriving at a consensus; so some formula is necessary for showing whether or not sufficient consensus does or does not exist.

DEAN LEDERMAN: Furthermore, you are up against the fact that it is the less populous provinces that are most in need of the benefits of the federal spending power.

PROF. FOX: Is there any agreement on the words that are used there, that is, what the programs are that are described as under exclusive provincial jurisdiction, because that is an important consideration. In other words, if you have not demarcated what the programs are, it could well be that you agree to a formula and then the federal government or somebody would say: "Such and such a program is not exclusively under provincial jurisdiction".

DEAN LEDERMAN: For instance, this consensus would not touch agriculture at all, because agriculture is a concurrent power and not an exclusive power.

PROF. FOX: Yes.

DEAN LEDERMAN: It would not touch immigration.

PROF. FOX: But surely most of the welfare programs are in the "gray" area, aren't they? Would the federal government agree that some of these programs are exclusive provincial areas?

PROF. BRADY: The federal government has commonly argued actually that it was a federal interest in seeing that the citizens of Canada, as it were, got reasonably equitable service, which, after all, conflicts with anything like the existing rigid division of powers.

DEAN LEDERMAN: Yes, but again we are talking about conditional grants, not unconditional ones. Any equalization you can effect with unconditional grants, the federal spending power and unconditional grants, is outside this formula.

MR. GATHERCOLE: What if you have one jurisdiction insisting, however, that this is not a federal matter at all, but that it is one that lies exclusively in the provincial jurisdiction and that it should administer it: then does

everyone accept that, or how is the arrangement to be carried out?

Is it one in which the federal government, as has happened in so many of these services, vacates the field in, for instance, the province of Quebec and administers it in others, but re-distributes the money around? Then is that service a federal service or is it a provincial service? How do you reconcile these conflicting definitions of what is provincial and what is federal, and to what extent is it provincial and to what extent is it federal?

The type of arrangement that we seem to be headed for, which seems to be fore-ordained, is one in which the Province of Quebec is going to be very much a state in itself. What do the other provinces do in face of this, in time? Everybody is hopeful that everything will work itself out. Does the federal government then use its revenue-collection machinery to re-distribute the moneys to these various states; or does the federal government say that each of the provinces, each of the states, looks after its own affairs and that we have a limited role in this area? Am I going away astray?

THE CHAIRMAN: No, I think this brings up a very important reminder that in tackling this formula we should be thinking not just of the

conditions that exist now but the conditions that we are heading into.

Don Stevenson reminded us that the federal government, through the White Paper on Taxation and Tax Reform, is likely to have a pre-eminent interest in income distribution; and if we move in directions of guaranteed income or negative income tax approaches to things, then we are going to be in a very different problem vis-à-vis all the welfare problems, for example, that may have been explicitly and traditionally in the provincial-municipal realm, but which may end up being dealt with by the broader technique of the re-distribution of income through the national tax system. In that case the fat will really be in the fire as far as trying to bring any sense out of the application of formulas and so on. That is what worries me a bit about where this is going to go.

MR. GATHERCOLE: When this new change comes into effect, as you say, it is going to be one which will be very much arrogated to by at least one province anyway. It will take out its claims to having full jurisdiction in this area.

THE CHAIRMAN: I think two things are worth noting here. I think, Don, when the Distribution of Powers paper comes out, for example,

I suspect that it will lean very heavily on the role of the national government in the future more than ever before, as a re-distributive mechanism both between people and between provinces and regions -- income re-distribution among individuals, regional development programs among regions -- and there will be a very big emphasis there.

Secondly, I think this acceptance which is the other side of the coin, is what has led a person like Parizeau to the position he has taken (something in line with what you are talking about, George): that Quebec and its values will always be different and therefore they will have to make their own arrangements in those matters; whereas the rest of the country will have to make its arrangements in a national sphere for its provinces. If I understand the logic of his position, that is what he sees happening. Then rather than the rest of Canada being handicapped by having to break everything down on a provincial or regional basis in order to achieve parity with what it is willing to do with Quebec, it makes much more sense to let Quebec look after its own arrangements and the rest of the country look after its own arrangements on a national level.

Now, that begs the broader question, of whether Quebec can survive or Canada can survive

apart, but just applying linear analysis I think that is the position to which he comes.

So that it goes back to the point Paul raised - or I guess Paul raised following George's earlier comment: are we engaged here in trying to play a formula game, or are we asking the prior question about what kind of Canada we want and what kind of federal system we want? Maybe the technique is running a little bit ahead of the goal or objective. I am quite worried about this, because it is a great hazard as I see it.

On the other hand, it all started with a dissatisfaction with the way we were operating our affairs and, as Ed said, a formula was postulated and it did not seem to suit. So we can say: "Sorry, we do not like that" and sit back, or we can try to advance the discussion in a positive way.

MR. GREATHED: The other dilemma too, Mr. Chairman, is, as we all recall, that if the birth of this whole business was formally with the Confederation of To-morrow Conference, there we began with an examination of what kind of Canada we would want. We certainly got into that in the very preliminary meetings of the Continuing Committee of Officials; and certainly the Prime Ministers and Premiers continued the discussion in the first couple of Federal-Provincial

Conferences.

I think the difficulty we ran into was simply that in talking about objectives and general goals and what kind of Canada an so on, we were getting increasingly mired in that discussion without some technical component being fed in which could illustrate the sort of objectives that we were hoping we could find in common and could articulate much more clearly than we had in the past. I think, with the proper caution that you noted, this is where we have run aground in some cases; that we have got more and more deeply involved with the technical problems and yet, without getting so involved, we are thrown back on the rather unsatisfactory discussion about objectives without some particulars to reinforce those kinds of conversations.

PROF. CONWAY: One thing about this, Mr. Chairman, is that it is postulated upon the present political geography of the country.

THE CHAIRMAN: Yes.

PROF. CONWAY: Which is probably an unrealistic geography. In British Columba, 2,055,519. If British Columba is half its present size, you would have another province with, say, 110,000.

It seems to me that in considering this whole thing, we really have to consider - although

it does mess things up somewhat - the political geography of the country, what we are, and having got this we are now driven back to other considerations.

MR. PERRY: Do we have to go around the whole wheel again? I thought this was all based on the general proposition that the provinces did not want the federal government launching new programs without their consent; and this was not an argument made by the federal government, but it was an argument made by the provinces; and that everyone agreed with this, including the have-not provinces.

Then it was quite obvious that some sort of formula of procedure had to be adopted, and this is what we are looking at. In other words, I am assuming that the decision as to a formula has been made, and that we are down to the mechanics now.

MR. GREATED: The idea of a formula certainly has been. I just worry about the larger questions that the Chairman and John ----

MR. PERRY: Well, there are millions of larger questions. We just put our head down and said: "Look, certain things have to be decided."

THE CHAIRMAN: I guess you are quite

right, Harvey; that is right. The prior decision, for better or worse, has been taken.

-----Off-the-record discussion.

MR. GATHERCOLE: I was going to say, Mr. Chairman - and this would be in response to what Mr. Perry observed - that sometimes it is better not to have a formula which is just a fiction (and is not more than fiction) that it is going to give you protection. Better not to have the formula than to have one which does not serve the purposes for which it is intended.

MR. PERRY: In spirit I am with you, George; I think this is a dreadful mistake. However, it seems to me the decision has been made, at the insistence of the provinces and not of the federal government; and it seems to me that that is water under the dam.

MR. GREATHEDE: Certainly with the recognition summed up in Mr. Trudeau's three words "No more Medicares", we had to find some way out of this. I think, correspondingly, on the part of the federal government, certainly with respect to their proposals on the spending power generally, there is a far more sensitive awareness of some of these problems. Whether it leads to a formula or just a greater willingness on the part of all governments in Canada to keep a

weather eye on these problems, I do not know.

MR. PERRY: God knows what sort of a straitjacket this will be even ten years from now, much less twenty-five years from now.

DEAN LEDERMAN: I agree with Harvey. I hope it is not too late to go back and perhaps scrap the whole thing and stop talking in terms of formula limitations of either federal or provincial spending power. I think every government, federal or provincial, is going to need all the flexibility it can have with the spending power, in order to face the problems of the future; and because there have been some, let us say, bad cases of interference with provincial spending priorities as a result of federal spending in provincial fields, perhaps the cure being proposed here is worse than the disease.

The real cure is more self-restraint by the federal authorities and more consultation in the political process before they do these things; and if the spirit of the thing changes you do not need to lock yourself into this sort of formula.

PROF. BRADY: I think you have to provide some way, however, of getting more of this consensive mechanism for doing so - I suppose regular conferences to discuss programs, annual federal-provincial conferences (more formalised

than in the past) in which programs would be reviewed might be one way. I think we have to consider, anyway, ways whereby this consent that you refer to is achieved. But supposing you cannot succeed in this, and that you have to really present a formula or arrive at a formula? I sympathize with those who think that it is dangerous, but if it is necessary to have one I think you should insist upon review of it.

Whatever formula you reach is not going to be satisfactory, in all probability, a few years hence, because the political geography (to use the term already used) is changing. We do not know what changes may occur in the shift of population interests in the next ten years. Constitutional provision has to be flexible, and any kind of formula (it seems to me) must be, in order to be flexible, one that will be reviewable.

MR. GREATHED: The other point I might raise in this connection, Mr. Chairman, is the not unimportant agreement - which I think has been reached out of commonsense, if nothing else - in the constitutional review process: that in order to undertake the review, we have to cover off agreed-upon areas which total up the whole package of the constitution; and that in the course of that review we reach certain agreement (not necessarily complete agreement but certain agreement)

at each stage. At the end, however, the whole thing has to be looked at together; and this will presumably be the really very difficult part of the exercise, which I think in part we are talking about this morning, where we have to take into account all the kind of sub-agreements that we have reached and say: "Now, how does this fit in with the context of the objective of the whole review?"

Personally I am not too concerned about the particular agreements you may reach in the course of that review, knowing that at the end the political people will have to sit down and presumably will have to take into account over a fairly long period what all these sub-agreements add up to.

In making this comment, I am not trying to suggest that we ought to put forward and try to come to agreement on things that are clearly, in the long term, unsatisfactory or dangerous; but we do have the problem of keeping the review going, of trying to finish a review and then at the end saying "What have we done, and what does it all mean?" I think at that point then the question of what kind of Canada we want and so on becomes more meaningful, because we can begin to relate the particulars to the whole.

MR. GATHERCOLE: Is it possible that the

formula which is being discussed here might have been applicable in the arrangement that existed in the past but might be meaningless in the future under the proposed new order of things?

For instance, you yourself mentioned the emphasis upon the regional development programs, to eliminate some disparities in the, perhaps, new tax program. Is it suggested that this formula would place in the hands of some provinces a right to curb this?

Two programs would appear to be central to the federal government's whole new program; and if formulas of this kind would not place the provinces in a position of being able to exercise some restraint on them, then it seems to me it is not going to serve a very useful purpose.

MR. PERRY: Let us just clarify that we are just talking about shared-cost programs, are we, in this formula?

MR. STEVENSON: Yes.

PROF. FOX: Shared-cost programs re matters under exclusive provincial jurisdiction.

MR. PERRY: Yes.

PROF. FOX: Which I do not think we should lose sight of.

MR. PERRY: No.

PROF. FOX: The other point is that it is not contemplated, surely, that this would

go into any revised B.N.A. Act anyway? This is sort of a working agreement among the governments, is it not?

THE CHAIRMAN: Well, I don't know.

MR. STEVENSON: I would say something like this, that you might get into a draft agreement on the constitutional provision. When you come to the spending power, a section that the Parliament of Canada should have the power to make conditional grants to the provinces on condition that a consensus is arrived at, and then you have anything like a formula: how you determine a consensus is a matter of continuing re-negotiation. This is the way I was reading the discussion back in June.

MR. DICK: This would be a constitutional provision, Mr. Chairman. You would include in the constitution the conception.

MR. STEVENSON: Not the formula.

MR. DICK: Leave the formula to agreement?

MR. STEVENSON: Leave the formula to agreement.

MR. DICK: How does that grab you? No, I don't think so. I had the impression (I think this is a very good point) that this was tending towards the inclusion in the constitution ---

MR. STEVENSON: Of the formula?

MR. DICK: Of the formula and the manner

in which these things would be dealt with, beyond interference by any one government in changing the formula.

MR. GREATHED: I do not think that point has ever been raised in any of the discussion of any of the subjects.

MR. DICK: Not specifically.

THE CHAIRMAN: It should be, should it not? We are starting here on constitutional review. One of the principal objectives, as described, is to ensure that, as a way of dealing with the "gray" areas, there should be some mechanism of limitation on the federal spending power, the federal spending power being an explicit feature of the constitution.

So presumably something has to go into the constitution, does it not, whether it simply makes provision there for agreed formulas, or whatever? How far does it go?

MR. GREATHED: Mr. Chairman, have not the Prime Ministers and Premiers very deliberately - at least, by implication perhaps - said that we are only reviewing; we are not necessarily re-writing, we are not necessarily even contemplating re-writing? This is obviously something we shall have to come to grips with at a later stage in the game.

My experience in review has been that

we have never had to think particularly of this question. As you say, maybe we should, but my thought was that it was the kind of question that you considered at the end. If the review seemed to have made sense, if it seemed to be relatively coherent, if the pieces could be put together in a way that made sense: then you had to have this ultimately very difficult political decision of: "Do you in effect start to re-write them?" That has been my understanding all along.

DEAN LEDERMAN: I was going to ask Harvey or Alec if they could tell us the Australian experience in this thing. They have a Central Economic Council with weighted voting, do they not?

MR. PERRY: They have a Grants Commission.

PROF. BRADY: A council that represents the states and federal government, introduced through an amendment to the constitution, primarily concerned, of course, with regulating borrowing of funds.

DEAN LEDERMAN: It is the getting-in of money, not the spending, that is being dealt with.

MR. PERRY: There are two aspects, are there not, Alec? There is a Grants Commission

which is very old?

PROF. BRADY: Commonwealth Grants Commission, which is less significant; was significant in the past, pre-war period.

MR. PERRY: And also there is a Loan Council, is there not (they call it), and all borrowing in Australia is done through this one commonwealth agency. I do not recall anything of this sort in there. You probably know a lot more about their written constitution than I do, but I do not recall anything of this kind of numbers game.

PROF. BRADY: No, I do not think we have anything to imitate, as it were, in Australia.

MR. PERRY: As one member of this Committee, I just take it for granted that the main decision has been made. This is not a bad attempt at a formula. The more you look at it, the more appealing it becomes. As far as I am concerned, I am willing to vote for it and let us get on with something else.

PROF. BRADY: For the Ontario ----

MR. PERRY: This proposal that is now made, yes. It is going to be purely arbitrary anyway. You can provide that it be revised every five years - on God knows what basis! - on another arbitrary basis.

MR. GATHERCOLE: Sometimes you do not find the solution though by acquiescing. I would

have misgivings about this formula here, which places ONtario in such a minor position in relation to all the other provinces.

MR. PERRY: George, you can make Ontario 9 or something.

MR. GATHERCOLE: I do not think it would provide a satisfactory solution.

THE CHAIRMAN: Maybe what we should do, as Harvey says, is make ONtario 9 and try to get P.E.I. to advocate it for us.

MR. DICK: Mr. Chairman, I am just what Professor Fox said and going to echo/what George had said earlier with respect to the establishment of any type of formula which was then going to be taken as some type of guide but much more fundamental, although this obviously has importance. I shudder, for instance, at the thought of anybody, when we get to constitutional amendment, suggesting that this has set a pattern.

I am exercised - exorcized perhaps - by the same thought as George that in arriving at the formula at this stage is something we would conceive as being in a constitution and which would deal with this area in this hard-and-fast manner. This is repulsive. I cannot see it myself on that basis, but I think perhaps what you have suggested and what has been spoken of is the thought: that is, if we are at the

stage where a decision has been made that a formula will have to be used and this is the type of formula obviously that other provinces, from our discussion, are thinking of, it is this type of numbers game you have described. This is what the federal government is looking at. I do not know whether that is predestined to force us into the same mistake or not, but my main point is that I have the same reservations as Mr. Gathercole in saying now that we accept the formula for this particular problem of conditional grants in areas within provincial jurisdiction; because that, as Paul mentioned, is something we can lose track of. If we are willing to accept this kind of formula - which I feel, frankly, downgrades seven and a half million people in relation to, say, Prince Edward Island when you look at the proportion of seven-to-one in that area: if that was ever conceived of as being a method of expressing constitutional amending opinion, it would be wrong.

THE CHAIRMAN: I guess there are two questions here we have to decide then. The first is to keep our eye on the ball, as Harvey reminded us. Going back to the June meeting, as I recall, did not a directive come out of that meeting to say that there was some dissatisfaction with the formulas express so far

and for the officials to get on with discussing alternative ways of doing this? Therefore, our first responsibility is to try to pose some alternative ways of doing this.

The second point is: whom do we speak for in doing that? I think we have to make the assumption that the other provinces are going to speak for themselves and are going to say what they think is right for them; and that perhaps at the outset we should not be too altruistic about this, but we should devise something that speaks for the jurisdiction we represent, on the understanding that there are going to be negotiations finally at the political level over the balance of power and influence and that should not be our decision.

MR. GATHERCOLE: What is wrong with reporting back to the effect that it does not seem to be practical to devise a formula which is going to be satisfactory to the other provinces and, at the same time, one that would give reasonable representation to the Province of Ontario and reasonably protect its interests?

Sometimes I feel it is better to say that there just is not any formula that seems to be acceptable, rather than to say: "Here is a formula that is satisfactory to the others. True, it opens the door for all kinds of

concessions by the Province of Ontario, but if you want it here it is."

Maybe that approach can be taken, but my belief would be that it is better to advise that there does not seem to be a formula that would meet the requirements of and satisfy the other provinces, and at the same time would protect Ontario's interest.

PROF. McIVOR: Is our concern here that we think it is impossible to devise a formula which will protect both the interests of Ontario and the rest of the country; or is our concern rather that we think this whole approach of devising any formula may be quite irrelevant and, indeed, damaging in the light of the future course of federal-provincial relationships?

MR. GATHERCOLE: I agree with the latter. To my mind the changes are occurring so rapidly that I feel that the merits of such a formula of this kind have been extinguished.

THE CHAIRMAN: But how does this reconcile with Harvey's major premise ----

MR. PERRY: And statements no doubt made in Ontario briefs on previous occasions

THE CHAIRMAN: Well, no, but with the premise which you draw quite properly that you are meaning that we are asked to get on with something.

MR. PERRY: This argument is over as far as the record is concerned.

THE CHAIRMAN: What does the record actually say?

MR. STEVENSON: That same paragraph at the top.

THE CHAIRMAN: This is from the record of the conference last June.

MR. STEVENSON: Report on conclusions.

THE CHAIRMAN: "It was generally agreed "that the Parliament of Canada should "continue to have the power to make con- "ditional grants to provincial govern- "ments, provided there is a satisfactory "formula for determining a national con- "sensus in favour of particular programs, "and provided there is a satisfactory "formula for compensation in non-partic- "ipating provinces."

MR. STEVENSON: Those latter two are then left to the civil servants.

THE CHAIRMAN: "With respect to the formula "for determining the consensus there was "agreement that the Parliament of Canada "and the provincial legislatures would be "the appropriate bodies to determine "whether a consensus exists, and there "was general agreement that the formula

"should reflect the regional character
"of the country. However, one province
"stated that while it agreed with the
"principle of establishing a consensus,
"it considered that the formula for
"amending the constitution might well
"provide the basis for reaching consensus.
"It was further agreed that the Continuing
"Committee of Officials should look again
"at alternative formulae."

Now, I suppose that could mean that you could look again at them with a view to deciding whether they were appropriate or inappropriate.

DEAN LEDERMAN: That does not preclude a finding that there is no satisfactory formula. It says "Look for a satisfactory formula", but that does not preclude going back and saying that there is no such thing.

MR. GREATHEDE: One of the most crack games in the play is the interpretation of the Prime Ministers' agreed-upon consensus; and I think perhaps naively, Mr. Chairman, your secretariat took these instructions to be just about the last word and we had better get on with the job.

I say this quite sincerely. I was quite fascinated with the discussion this morning and I think it has raised a number of questions

which have certainly given me some second thoughts about the formula; but there has to be a point of departure and this is the paragraph Ian just read out.

THE CHAIRMAN: We are in a particularly ticklish spot, because if we come back and say "there is no such formula" are we then saying that there is no way of meeting the objective which the government of Ontario has argued about more strenuously than anyone else that there must be a limitation of the federal spending power vis-à-vis joint programs - there must be no more Medicares?

MR. DICK: Mr. Chairman, I don't think so. If I might make this observation, one of the positions that our Government has taken is that constitutional amending formula is something we should be looking at as soon as we possibly can.

In my own view, when you talk about a method by which a province is going to surrender its jurisdiction to another government, you are in fact talking about constitutional amendment.

The observation was made by one province that perhaps this was closely associated with constitutional amendment. The thought ran through my mind at the time that the type of thing we are talking about here where provinces

or governments are going to express a consensus by which they are going to surrender or share a jurisdiction, this is in fact constitutional amendment.

To my mind it would be quite consistent for this Committee or the Government to take the position that in looking at this now and having studied it, the impact and significance of this type of formula is in fact a form of constitutional amendment; and that it was perhaps premature to say we could arrive at this formula without at the same time considering a possible constitutional amending formula; and that perhaps those two should be looked at together rather than separately.

MR. STEVENSON: I think it was pretty clear in the two meetings of this group and later that when proposing the seven-provinces-60-per-cent formula, we were very much thinking this would be an ideal formula to apply to the discussions on constitutional amendment.

MR. GREATHEDE: That is right.

MR. STEVENSON: It was one of the reasons it was proposed that it was close to the one discussed for the old Fulton-Favreau.

What we could do, of course, is just go ahead and say "We still like our seven-provinces, 60 per cent."

MR. GATHERCOLE: That is what I would say.

MR. DICK: You are talking about constitutional amendment.

PROF. McIVOR: And you would presumably recommend, George, periodic review of the formula to conform to its underlying principle!

MR. DICK: Don't answer that!

MR. GATHERCOLE: I was going to add this, that I feel the federal government is embarked on certain courses that are going to change the economic face and substance of Canada, and I have some misgivings about the adoption of certain methods by which this would be carried out.

I am old-fashioned enough (perhaps I am out of date) to believe that money should flow into areas and economic pursuits where it is going to be most rewarding; and this being a fundamental concept with me, I do have misgivings about the federal government launching a program the main instrument of which is going to be the re-distribution of income, of productive capacity.

When you look at the various programs which have been undertaken to develop industry in various parts of Canada, the sort of forced Hart House type of development, it would seem

that most of these plans have been failures when they have been attempted.

-----The Chairman left the meeting.

DEAN LEDERMAN: Provisions for periodic review of the constitution are in themselves dangerous. Is this not what contributed in no small measure to the break-up of the West Indies Federation, that they provided for a review after five years and everything was up for grabs?

PROF. BRADY: They did not wait that long.

DEAN LEDERMAN: Did not even wait that long, and things went to pieces.

There is something to be said for closing the lid of Pandora's box and saying "We have got to make it work the way it is.

MR. GATHERCOLE: I remember David Porter used to argue very strongly that it was a very grave mistake to have a constitution which was capable of ready amendment. Perhaps one of the salviations of the constitution we have had even for the years in which it has been in operation is that it did not have an amending process.

DEAN LEDERMAN: We had to make it go the way it was.

PROF. BRADY: Certainly assured more flexibility. I think it is the basic point that

the provinces were dissatisfied about programs. Ontario was dissatisfied about shared-cost programs introduced by the federal government without anything like adequate consultation and discussion. If it could ensure that there was discussion before programs were introduced, discussion in the federal-provincial conferences, adequate discussion, perhaps you could get along without a formula.

DEAN LEDERMAN: Is this not the right way to come at it: to institutionalize not a formula but a procedure for consultation?

MR. STEVENSON: Mr. Chairman, the big example that was being used by the Premiers when this was being discussed, was that of Medicare, and there was all sorts of advance discussion on Medicare - you might call it consultation. I think the big problem was that you could not get agreement of very many governments. I think it was not so much a problem of consultation on the Medicare issue but the problem of agreement.

PROF. BRADY: Could you have got an agreement if you had a formula up to, say, this kind as proposed?

MR. STEVENSON: Maybe not.

MR. GREATHEDE: You might have got it, but it might have been negative.

DEAN LEDERMAN: But, you see, that

was not consultation. Mr. Donald and others made it quite clear there were all kinds of federal emissaries going to provincial capitals with Medicare schemes, but it was: "This is it. Take it or leave it." There was not consultation about what the scheme was to be or what it might be or whether it was to be.

MR. PERRY: A very simple formula would be that at the request of three, four, five provinces, any new federal program in this area be postponed for two years before enactment, and this would ensure that the federal government would get around and get support before such a program be introduced.

MR. GREATHEDE: I suppose in large measure it also depends on whether you have a Mr. Trudeau or a Mr. Hellyer in the chair of the Prime Minister's cabinet.

DEAN LEDERMAN: Or a Mr. Pearson.

MR. PERRY: In a way we are reviewing some pretty fundamental things here which I think the record shows at least immediately have been decided. I wonder if the position perhaps is not as Ed Greathead has set it out? That is, that this decision has been made; that perhaps in the ultimate over-view of the whole thing it will collapse in favour of something more rational. I would hope that myself, but in the meantime

we do seem to be faced with one of the stepping-stones which at this moment is not up for review, I would not think.

MR. GATHERCOLE: Would it not be possible in reporting on this formula, however, to suggest that you consider the best formula the one that has already been proposed, and that anything less than this, such as you might then provide by way of illustration, would seriously undermine the position of Ontario? What is the use of having a protection if it is a mere fiction? This is the thing that puzzles me. If you have not got it, you are then placed in this position that you seem to have adopted something to give you protection which is non-existent, in the course of which (in my judgment) you may have misled others and in the end would drop on yourself the censure that you had not been very wise in the formula that you devised in order to achieve your goal or objective.

MR. PERRY: It may not be so much a fiction, George. If you think of the possibility of Quebec, Ontario, Alberta and British Columbia having some general attitude towards the federal government, you have quite a strong majority vote.

MR. GATHERCOLE: It may work out, would be worked out in the case of Medicare, but I can think of a lot of other programs in which

it would not evolve in that way.

PROF. FOX: I wonder, Mr. Chairman, whether you need to take up the issue of the formula at the next round. I think two points have been raised here that could be put forward by Ontario as matters for discussion in connection with this item: first, the one Dr. Brady raised, which is the question of review; and, second, the one I think I raised, which is this question of what are we talking about when we talk about programs under exclusive provincial jurisdiction.

I still feel rather strongly about the latter of these particularly, namely, that if you are putting forward a formula that you are supposedly recommending and you do not know what it is going to apply to really, it seems to me rather odd. Why should you decide on a formula before you know what you are talking about?

PROF. McIVOR: We seem to express pretty general and widespread reservation about the appropriateness of any formula approach in this area. I do not see why that could not be indicated, and then go on as you suggest: "If we are going to adopt a formula, then we think such and such in the immediate future is as satisfactory as anything else"; but point to the severe shortcoming that you mention, that the whole thing is useless anyway if there is no

agreement on what are the areas of exclusive provincial jurisdiction and what are not.

MR. PERRY: But is not the practical situation that there have been only two formulae put forward: one is the federal and the other the Ontario one? In other words, Ontario has already put forward a formula so it is sort of committed to the concept.

PROF. McIVOR: Except they would be asked to go back and think again.

MR. PERRY: But it is rather more committed than any of the other provinces who did not even put forward a formula.

MR. GATHERCOLE: I would not say that the formula may not be suitable. I would feel that it should be more widely applied than perhaps just to the shared-cost programs, but I think it should be a formula which gives due and proper recognition to the economic position of Ontario in the whole.

MR. PERRY: My own feeling is that I hope ultimately good sense will prevail here, but I think immediately we are in a situation where it would be extremely difficult for the Ontario representatives to go back now and say: "We have ditched the idea of a formula", being the only province so far that has put one forward.

PROF. FOX: I was not suggesting that, Harvey. I was really just suggesting that

unless it retards things too much, we sit out this round on the formula and let other people talk about it if they have thoughts about it.

MR. GATHERCOLE: You have put out a formula and it has not been acceptable. They have said: "Since it is not acceptable, go back and try to work out one that is acceptable to the other province." In seeking to do that, it seems to me you have then reached a position in which it is not acceptable - at least it would not be in my opinion - insofar as giving adequate protection to the interests of Ontario.

MR. PERRY: I am provisional Chairman here. Can we have some sort of consensus on this?

MR. POSEN: By what formula? (Laughter)

MR. PERRY: I am not even sure what the question is. It always helps if you know what the question is. Could we simply leave it that we cease and desist at this point, and let the staff assume what they like to assume from the discussion?

MR. GATHERCOLE: I think so.

MR. PERRY: You no doubt found us helpful and confusing.

MR. GREATHEDE: We will go down to Ottawa armed with the caution you have introduced.

PROF. FOX: My own feeling is one

of apprehension that if you get into the numbers game, it has much broader implications for this specific issue you are discussing. It may not matter a darn; there might not be a single issue come up under this matter of exclusive provincial jurisdiction to which it would ever be applied; but you would have agreed, in effect, to have the formula imposed upon you, knowing it could then be used in an argument against you on a much broader perspective than you meant it to apply. So the original purpose would have been null and void, would not have been fulfilled, and you would be stuck with something that you did not want to be stuck with and which might embarrass you in trying to get out of it later.

MR. STEVENSON: I suppose I could take from the discussion that the group here, certainly as a general opinion, is opposed to the consensus which suggests that any formula should reflect the regional character of the country.

PROF. MEISEL: No, I do not think we are saying that.

PROF. McIVOR: What was that proposition again, Don?

MR. STEVENSON: Well, part of the consensus of the Prime Ministers that any formula should reflect the regional character of the

country, This was the big objection of the Ontario formula: there is nothing there to say anything about regions; it is only population.

PROF. McIVOR: But there has been no general objection to that proposition, has there, during the course of the discussion?

MR. STEVENSON: By implication, I would say.

MR. GREATHEDE: Yes.

PROF. MEISEL: I think you are reading things into what various people have said.

MR. PERRY: George wants it to be regional but more regional for Ontario.

MR. GATHERCOLE: Right. I would assume population to be a regional characteristic.

DEAN LEDERMAN: What I would really argue for is a change in the method of approach, not the formula of approach, of a political, institutional approach, in which regional interests would be taken account of, but not according to a rigid formula. At some point you have to trust the people who are running the governments to be sensible.

PROF. MEISEL: Mr. Chairman, I would like to comment on something Paul mentioned earlier. I think he is quite right, of course, that there is real danger in adopting a particular formula in one area; because later somebody

may press you to adopt the same kind of formula in an area where we are not nearly so prepared to be generous and to give ground.

It seems to me that you can protect yourself against this course of events by making it very explicit. If, for instance, in something where you consider you can be flexible and perhaps conciliatory and yielding, you say: "Well, in this particular area I am quite prepared to accept this kind of formula, but I do so without prejudicing my interest in other areas where I might not be prepared to adopt this kind of formula." I think you should state and go on record, defining the sphere within which you are prepared to make this kind of compromise. Then I think you are really covered.

The other thing I would like to suggest -- and I do not know what the answer to this is and there is a question mark in my mind: I would like to know whether the presence in the negotiator's mind of the need to come to a consensus through means of a formula, facilitates or impedes compromise.

There may be something in the literature on bargaining that I am not familiar with (I dare-say there is) where one found probably find out whether in general and under stated conditions

the fact that negotiators have to move towards a formula kind of vote makes the intransigent people less intransigent or more intransigent. I don't know.

MR. STEVENSON: My own feeling -- and this was certainly the result of a number of discussions with various people discussing the formula or the approach on this question -- was that by having a formula, by having a standard like this, if the federal government feels very, very strongly about a particular program, you force them in the consultations to make certain amendments or to arrive at certain agreements, and then produce the national consensus - if it is going to go that far.

It will mean that there is a lever which the provinces in whose constitutional jurisdiction this particular program would fall, would have when it came to the bargaining over the terms of the program, which you do not have now.

This is the problem with something like Medicare. You could discuss it all you wanted, but consultations may not be meaningful unless there is some kind of lever that you have to arrive at some kind of agreement before the thing can be effective.

MR. GREATHED: The other point I would like to mention, Mr. Chairman, on what John just said: that there is a real question -

and this is particularly true at the officials' level, and I think is even true at Prime Ministerial level at this stage in the review - as to whether we are in a bargaining and negotiating atmosphere. I do not think this has been at all explicit; in fact, I think it has generally been conceded that this is not the case. Therefore, what we are trying to do is not really say "This is the final word on this particular subject" but "At this point in time this is what we can roughly agree to without necessarily committing ourselves to anything until the end result has been arrived at."

I think this is particularly true in the crucial area of the distribution of powers and on the point that Paul was making earlier this morning, that until you really know or have some idea of what a new distribution of powers might look at, it really does not make a great deal of sense to agree to such a thing as a formula; but make some progress at each stage of the discussion and agree certainly to come back at the end and say: "What have we done, and does this make any sense?"

MR. PERRY: Well, there are all sorts of middle courses. One means of stepping away from this, for example, would be not to have it mandatory but to have a situation that could

be invoked at the request of two provinces, and automatically invoked at their request. This may be all you need to introduce a salutary slowing-up of momentum at the federal level.

MR. GREATHEDE: The fundamental premise of what we have been doing so far has been that any government and all governments are free to reject, amend, push forward any propositions that they have put forward in the past. That is the nature of a review.

DEAN LEDERMAN: John's point about decision-making is well taken, but what was in my mind about this was that the only thing you put in the constitution is a procedure for a mandatory consultation. Perhaps it is this automatic thing of two provinces being able to call for it, as Harvey suggested; but after the consultation is over someone has to make a decision, and my reaction to that would be "Well, if it is the federal spending power that is in issue, the federal government makes the decision as to whether the consultation has indicated that they should or should not go ahead, and /no doubt they are prepared to lay it on the line in the next election."

MR. STEVENSON: In an area of exclusive provincial jurisdiction, this was the big point Ontario was making, that the federal

government should not have this power unfettered.

DEAN LEDERMAN: To spend its way
into an area -----

MR. STEVENSON: To spend its way
into an area of exclusive provincial jurisdiction,
and there must be some means by which the provinces
have a lever to prevent the federal government
doing just that.

MR. GREATHEDE: There have been in
the setting-out of the federal spending power
position enormous concessions on their part,
and the recognition that perhaps the previous
untrammelled right could usefully be checked in
some way. I think this has probably been the
biggest concession in the whole exercise -
which they are quite free to renege on as part
of the terms of reference of the review; but
I think we were all struck by the seriousness
with which the federal government took this
particular problem and the degree to which they
were prepared to consider alternatives.

MR. GATHERCOLE: Mr. Chairman,
have they exhibited any tendency to expose their
policies to federal-provincial control or restraint
in other directions in which they are showing a
very strong interest?

MR. STEVENSON: I think this is their
position. They are now ready, I think, to move

out of moving into areas of exclusive provincial jurisdiction, and to put their basic thrust in areas where there is a mixed jurisdiction, a "gray" area, the economic sphere, regional development.

Nevertheless, I think there was a strong feeling by Mr. Robarts and others that at least in this area it is progress if you can arrive at an agreement for limitation in an area that has been a real sore point in the past.

You are quite right: it may be locking the barn door after the horse has been stolen.

MR. GATHERCOLE: It may be too like giving the sleeves out of your vest.

THE CHAIRMAN: I just had a word with Mr. Perry and I think, as I understand the discussion, there is a great deal of apprehension or a great deal of concern expressed about this whole approach, and I am not sure that we shall reach any consensus on this. However, I think our purpose was to collect the advice of the Committee on this, and we shall then have to discuss this in turn with the government and try to represent the various positions that are taken on this, and they will have to decide where we are going from here. Perhaps we have given this paper all the treatment we can at this time.

MR. GREATHEDE: Significantly, Mr. Chairman, no one has criticised the essential beauty and symmetry!

PROF. MEISEL: It is a lovely formula!

MR. STEVENSON: Too symmetrical.

DEAN LEDERMAN: As formulas go.

THE CHAIRMAN: We might break now for lunch and come back on the other papers, resuming our meeting, say, at one-thirty.

I might remind the cultural and linguistic sub-committee of the meeting in Mr. Stevenson's office during the luncheon.

As I say, we will go on with our next paper at one-thirty.

-----Recess from 12.40 to 1.45 p.m.

THE CHAIRMAN: Gentlemen, can we proceed? We are having a lot of constraints close in on us. Mr. Seguin and Mr. Gathercole have had to leave already; Mr. Fox has to go early to a commitment, as do Messrs. Perry and McIvor; and I am in the midst of a little crisis upstairs and have a meeting with the Treasurer and the Minister of Health in the middle of the afternoon. Mr. Dick has another Minister to deal with at two-thirty.

PROF. CONWAY: Would you like me to sit here and meditate? (Laughter)

THE CHAIRMAN: I think we are going

to move very fast in the next hour and see where we have got.

First of all, the other little paper which is on a subject which will be dealt with by the meeting of officials (constitutional committee) next Tuesday and Wednesday on the constitutional aspects of regional disparities, is very brief, and perhaps we could deal with it forthwith.

MR. GREATHEDE: Mr. Chairman, I might just say that a bit of the background to this particular paper is, I suppose, that in part and in the absence of concerted and concrete national action on this question of regional disparities, some time ago I think some of us resorted in desperation to the rhetoric of the constitutional aspect of the problem; but we have been asked by the Prime Ministers and Premiers to examine this particular aspect of the question; and very recently (but unfortunately not in time to send to this Committee although in due course we will send it around) the federal government has produced a rather lengthy paper on this subject which really comes to the conclusion that a constitutional obligation regarding regional disparities is unwise.

MR. STEVENSON: I read the last two sentences of the federal paper, Ed. That really

sums it up:-

"On balance, therefore, it is the view
"of the Government of Canada that the
"disadvantages of imposing constitutional
"obligations for the reduction of regional
"disparities outweigh any possible
"advantages. While the Government is
"prepared to give further consideration
"to any specific proposal for constitu-
"tional change in this respect, on the
"basis of existing proposals it would
"not favour the introduction of such
"obligations."

MR. GREATHEDE: I might say this is a conclusion which both Canada and Ontario had reached earlier without the benefit of the vast research which undoubtedly went into the federal paper - in which, in one sense, when you have the opportunity of reading the federal paper, I think you will see that their position is somewhat defensive and the arguments are couched in rather negative terms.

THE CHAIRMAN: Does that imply that ours are somewhat offensive? (Laughter)

MR. PERRY: "Bland" is the word.

MR. GREATHEDE: We will circulate it privately to the Committee, with the usual restriction, because it is still in the Continuing

Committee and, as with so many of these papers, has not been distributed. Ultimately, I think, it will find its way into the public purview, probably shortly before the December conference, but it is a little hard to anticipate how the governments particularly of Newfoundland and Nova Scotia will react to it, especially when they have pressed this issue very hard indeed.

What we are faced with, of course, on the whole question of regional disparities, is not the question of the constitutional aspects of it (which, I suppose, is not a terribly profound question) but the whole problem of the implementation of operating programs, which is really the very tough problem.

However, for your consideration we have prepared this paper and, as always, Mr. Chairman, we would appreciate the comments of members.

PROF. McIVOR: It strikes me, Mr. Chairman, that the basic philosophy embodied in this short paper is a very sound one, and I have no serious criticism to make of it at all.

It would be a great mistake to get involved with any constitutional commitment for specific responsibilities other than the statement of the objective and the commitment to develop wherever possible and feasible programs to try to minimize the extent of the disparities.

It seems to me it just has to be left in very general terms - the statement of serious intention to do a job wherever there is any possibility to do so.

PROF. FOX: I would agree with that, Mr. Chairman.

PROF. BRADY: I would too.

PROF. FOX: Next paper!

THE CHAIRMAN: I am getting uneasy about this gathering consensus! (Laughter)

MR. PERRY: Let us go on to the next one.

MR. GREATED: I warned you it was not very provocative.

MR. STEVENSON: Does anybody disagree?

MR. PERRY: Not me, or I, as the case may be.

PROF. McIVOR: There is one sentence which raises a very slight question in my mind on page 2 about five lines down:-

"Quebec propositions concede the federal
"government only very limited scope
"for action."

Then you say:-

"The right to make unconditional grants
"and to maintain balanced economic growth"
This strikes me as perhaps not leaving limited scope for action but almost unlimited.

MRS. WILENSKY: It is the wording of that proposition, I think. I think they themselves in the explanation of that proposition use the word "limited" in comparison to some of the things that, say, Ontario might prefer to see in the hands of the federal government.

PROF. McIVOR: My basic point was that within the expression "to maintain balanced economic growth" it could leave it virtually unlimited.

MRS. WILENSKY: I think though in the proposition they imply that they were not leaving it unlimited; that they see that as a limited area.

MR. PERRY: As long as they see it that way, let us agree with them.

PROF. MEISEL: Mr. Chairman, I am a little puzzled by the last three words of the memorandum "formal inter-governmental concert". What is exactly meant by that, a conference for the purpose?

PROF. McIVOR: Perhaps some formula approach.

MR. GREATED: No. We had some internal discussion on this, and you can probably see the typing is a little different.

THE CHAIRMAN: What did it use to say?

(Laughter)

MR. GREATHEDE: I will have to rely on Mrs. Wilensky's memory on this.

MRS. WILENSKY: That inter-governmental co-ordination be increased.

MR. GREATHEDE: Yes, I was a little unhappy about co-ordination being increased. I just thought we should have here something which had a little more teeth to it. I think what we are speaking of here is either Ministerial Committee, such as we have now on regional disparities ----

THE CHAIRMAN: Why not change it to "formal inter-governmental machinery" and then turn over the interpretation of the machinery to the broader processes dealing with inter-governmental machinery?

I do not think the purpose of the paper is to deal with the machinery but to state the principle. There is another term of reference, and that is the whole machinery business. "Machinery" covers consultation and action.

MR. GREATHEDE: Parenthetically, Mr. Chairman, I think we might just say that I think it has been your view and the government view here that this matter ought to be raised higher on the agenda.

THE CHAIRMAN: Machinery, yes.

MR. GREATHEDE: Constitutional review.

THE CHAIRMAN: May we happily go along

with that one?

The other two take us into more complex questions in the body of the paper - the Supreme Court and the fundamental rights. I am not sure. How far have these been in the mill with Mr. Dick?

MR. GREATHEDE: Not very far, except over the course of the summer we have exchanged views on the question.

On the fundamental rights paper, the situation has been that a variety of positions has been set out. Ontario has certainly made its position clearly known last February. The federal government's position is fairly well known. I think most governments have contributed quite a bit to this particular subject.

When the Ministerial Committee met in May, there were a number of very severe reservations about the federal approach. The Deputy Minister of Justice can correct me here, but I think the conclusion of that meeting (as I reported to the O.A.C.C. at its June meeting) was that the burden of proof on this whole matter rested with Ottawa, as Ottawa was advancing the case most strongly and extensively; and that we had to ask ourselves some very fundamental questions about what was at stake and what are the technical problems and so on. I think most governments had felt that in the federal advancing of the case these very

fundamental questions and some of the very difficult technical questions had not been sufficiently researched or studied. Therefore, the intention of this particular paper was to attempt to put the issue in some perspective and to pose (perhaps a little too indirectly for my liking, but that is neither here nor there) some of the very difficult questions directly; so that the officials and the Committee of Ministers on fundamental rights could consider these before making any further recommendations to the Prime Ministers. Is that correct, Rendall?

MR. DICK: That is a very accurate summation, I think.

THE CHAIRMAN: Well, the Ontario position was really carried forward and put out fairly directly by Mr. Wishart last February. Does this paper, in a sense, fill out the body of that argument; is that its purpose?

MR. GREATHEDE: It certainly reflects the position and simply attempts to ask some of the deeper questions that have concerned the Ministers in talking about the subject last May; but it in no sense represents a departure from what the government has said on this question.

THE CHAIRMAN: I guess what I am really asking is: Does it raise questions that we can study from the point of view of carrying Mr.

Wishart's position further or more explicitly or more directly. Where do we go with this; where does this paper go now?

MR. GREATHEDE: This is a tactical matter, Mr. Chairman. I know Rendall and I have discussed this, if he would care to speak to this. It is really a question of tactics.

Just the other day we were talking about what you do with a paper like this. I think the original intent was that it might be submitted to the Ministerial meeting in November, and expecting some very profound and deep discussion of the issues that it has raised. Whether we shall actually do that, or whether that is the most desirable course of action, I am not quite sure.

PROF. BRADY: I wonder, Mr. Chairman, if I might say that as an outsider, so to speak, who does not know what kind of discussions went on, that it struck me that after page 11 I liked the latter part of the paper, which is really re-stating Ontario's position as it was presented by the Attorney-General - a position, I might say, with which I am fully in agreement.

The earlier part of the paper, I think, could have been compressed somewhat. There are some remarks there that I would question. I mean, I do not question the basic idea that the remarks are intended to convey, but the language

in which they are conveyed.

It seemed to me that the Ontario position is stated from page 11 on.

I wonder just for whom this paper was intended. Is it intended for outsiders or merely for those within the secretariat, within the government of Ontario? If it is intended for outsiders, I would have thought you had better be a little more careful about the argument in the earlier part of the paper. I think part of it could be dropped. That is merely my personal impression. Others may have a very different one.

MR. DICK: Mr. Chairman, I think this is interesting, because this is what arose in my mind rather. I saw the paper.

Ontario's position has been consistent really from the first time these discussions were undertaken, both through Mr. Robarts and through Mr. Wishart, that if there is an area for a charter of fundamental rights we see it as being confined at this stage to the political rights.

We have said this; we have stated publicly our reasons and concern with respect to the constitutionalizing of these other areas. We have spoken about the historical problems, the practical problems, the legal problems and everything else.

I had some aversion myself to putting

a paper into the mill at our next meeting of Ministers which would again place us in the position of being critical of the establishment of fundamental rights in the constitution.

We know that the federal government are developing a paper which will be presented to us, on the history and practical effect of these bills in other countries. We understand that the western provinces have undertaken their own study, which I cannot help but have the feeling will be cast in a particular mould, but the study will be in the same area.

For Ontario to put a paper in at this time, I think, might be needlessly generating a lot of discussion in a rather sensitive area, especially if the position became published or this type of thing.

I know our own government does not want to be in the position of being anti-Bill of Rights. Our present terms are that we are for a Bill of Rights but in a particular form such as we have described in the latter part of this paper.

So my attitude has been that we describe the affirmative position we have, that we are for a Bill of Rights, charter so to speak, with respect to these areas; but we do not necessarily have to get into disparaging and

critical comment as to why we do not want it in other areas.

MR. GREATEHD: We may do it orally.

MR. DICK: We may do it orally. That is always somewhat less offensive somehow than putting in a paper which brings you right into the teeth of motherhood.

My thought was much as Professor Brady's, that we take the affirmative position in the area we have already espoused.

DEAN LEDERMAN: Mr. Chairman, I feel that I can contribute something that we ought to know at this point, provided it is treated in complete confidence. Perhaps Mr. Dick knows it.

-----Off-the-record discussion.

PROF. FOX: If we could return to the record and pick up where Bill intervened to give us this information, I would like to echo what Professor Brady has said, and Rendall.

I think that the speech Mr. Wishart gave at the conference last year was, in my opinion, absolutely excellent, and I think he put the problems excellently.

I had exactly the same impression as Dr. Brady when I read this, that from page 11 on it is very good, but that the first part is a little bit woolly and diffuse and does not add

anything really. If you want to criticize it, I have a few questions to raise; and in the absence of Dr. Forsey I would take upon myself the duty of pointing to a dangling participle or a few things like that. If we are going to scratch the first eleven pages it does not matter, but I think from page 11 on it is very good, and it merely confirms the position we have taken.

DEAN LEDERMAN: I should say that the mails failed and I did not get this read, so I cannot comment on this paper.

THE CHAIRMAN: The real question is: is it gilding the lilly, or where does it take us beyond what is already policy?

I think the practical consideration falls into two parts. I think we could strip down the first part and use page 11 on, and use this as further material in the Committee of Officials at once; or we could retain it and take it up again in company with the McRuer report when it comes out, in the course of preparing Mr. Wishart for the Ministerial meeting in November. I think those would be the two practical options for disposition of it. Gary, did you -----

MR. POSEN: No, if I had to take an option right now I would vote for option 2, but I do not think the question of fundamental rights will come up before the conference.

THE CHAIRMAN: No, maybe the problem will solve itself then. I think we have had an expression of opinion on it, and I think our only problem is not so much with the content as with the disposition. So that perhaps we might hold that in suspension.

MR. GREATHEDE: Our point of departure on this, Mr. Chairman, was, of course, the May meeting of Ministers.

THE CHAIRMAN: Yes.

MR. GREATHEDE: I think it has to be noted that at that meeting there was considerable frustration in trying to find out exactly what were the arguments and the basis of the arguments being advanced by the federal government.

Now that we have Mr. McRuer's second volume in the wings and the basic position as enunciated previously by the Prime Minister and the Minister of Justice, I think perhaps we can proceed simply to prepare something a little differently, or at least decide whether we should prepare something a little differently for November.

THE CHAIRMAN: All right. Now I will see if I can dispose of the judiciary as quickly as we have side-tracked fundamental rights!

MR. DICK: If you have disposed of the Department of Justice, you should not have

any trouble with the judiciary! (Laughter)

THE CHAIRMAN: The Supreme Court of Canada. I will not repeat here the colourful description of that body given by my colleague, the Deputy Minister of Justice, at the last meeting of officials, that goes right to the text!

MR. GREATHEDE: Again, Mr. Chairman, this paper is part of our effort to contribute some input into the review on the major questions which the review is considering. The Court is one attempt, the paper on the Senate will be another. I think that is really all the background that is necessary on this particular one, because it speaks for itself.

THE CHAIRMAN: Would you like to say anything about this one, Rendall, or this area?

MR. DICK: I would make a comment on the area, Mr. Chairman, if I might, also in the light of Professor Lederman's very thoughtful paper on a similar subject - and I do not think it is by chance that the paper prepared by the secretariat carries so many of the fine principles contained in Bill's comments before us.

I find myself in substantial agreement with all of the principles espoused, and I think this is quite consistent with what my Minister and the Government perhaps feel about the Supreme Court of Canada: that it should remain as a

court of general appeal throughout Canada; that it should be constitutionalized, it should be ensconced in the constitution in its form - security of tenure and so on, all of these things, and, most importantly, the aspect of the nominating commission and the methods that we have seen available for providing provincial expression in the appointments. This is perhaps the most viable, the most workable, the most consistent with the judicial system as we know it and as we would like to see it perpetuated. The manner of the appointment to the nominating commission and the nature of the nominating commission, would still be open to discussion; but certainly the method of appointment and the principle of the selection of judges from persons who have been placed before the Governor-in-Council by the nominating commission is a sound one, we feel, in resolving this area of our problem.

Following that, the matter of the constitutional court as distinct from the Supreme Court, inherent in our discussion of the Supreme Court, we carry with that the principle that it would remain as the court dealing with our constitutional disputes as well, but that gets us into another area.

Briefly, those were our own views on the Supreme Court of Canada.

THE CHAIRMAN: Bill, you did not get this paper in time, you say?

DEAN LEDERMAN: No, I am afraid I have not been through this paper, but my views are before you in the other paper.

THE CHAIRMAN: Yes. Again, Ed, what was the thought on where we go with the subject? As I recall, the Ministerial Committee on the judiciary made relatively perhaps the best progress.

MR. GREATHEDE: That is correct.

THE CHAIRMAN: Of the four committees that met - or, at least, with the exception perhaps of Official Languages which had a longer background.

MR. STEVENSON: My feeling would be, Mr. Chairman, that if this paper can be adapted to meet the wishes particularly of the Department of Justice but also of Professor Lederman and others here, and presented to a constitutional committee of Cabinet or some such group in the near future: it would be extremely advantageous if the Government could, in advance of the Ministerial meeting in November, send something like this to the Secretariat for distribution to the other governments.

It is one area where there has not been that much put in formally by various governments other than on some of the aspects. This paper

goes into several of the aspects that really had not come up very much - the appointment of provincial justices, this kind of thing.

There is always something in getting a paper in early, in terms of having its weight felt.

DEAN LEDERMAN: As far as my own position is concerned, I would have to go through this, and I will go through it and send you written comments.

MR. GREATHEDE: Thank you very much.

DEAN LEDERMAN: On the parts of it that are not already covered in the paper I sent you. I did not deal with the appointment of provincial judges; I stuck strictly to the Supreme Court of Canada.

MR. GREATHEDE: I think, as Don has indicated, it would be extremely helpful if at the Ministerial meeting on the judiciary there were some focus for a discussion of this particular problem; in which, as the Chairman indicated and as, I think, Rendall would agree, there has been remarkable progress, and all it needs is really something which the Ministers can consider and can put forward in terms of concrete and tangible recommendations to the Prime Ministers in assembly.

MR. DICK: I think, following that,

Mr. Chairman, the ones that were essentially directed to the Supreme Court: the reference to the position we have taken with respect to provincial judges and section 96 appointments, was one that really we threw into the mill at the end of the Ministerial discussion because it was one which had been tacitly avoided by the Minister of Justice in our own discussion with him and we felt that it was something that had to be aired. So we put it in as something at which we should be looking.

I would not say at this point that our Government is committed or my Minister is convinced that these should be provincial appointments, but we think it should be studied.

PROF. McIVOR: May I ask, Mr. Chairman, in connection with the very first paragraph of this brief, which is a paragraph that is repeated later on in the summary: is there any reason why it should not read down four lines or so:-

"The Supreme Court of Canada is the
"final court of appeal in disputes that
"involve our laws under federal and
"under provincial jurisdiction"
in the very first paragraph, page 4?

MR. DICK: I had a question mark at that with a big, fat "No"; because, of course,

the Court did assume that, but as it stands it is vulnerable to the argument that could possibly be raised that it simply assumed that.

PROF. FOX: Perhaps little points like that could be improved.

DEAN LEDERMAN: I do not think that is historically right, because one of the reasons why the establishment of the Supreme Court of Canada was considered was because 1875 was the great year of judicial reform in the United Kingdom, and the House of Lords and the Privy Council were in danger of being abolished, and without a Supreme Court of Canada we might have found ourselves without a final court.

THE CHAIRMAN: I think Mr. Stevenson's suggestion is perhaps the most useful one at this point, that we get further feed-back from the Department of Justice and Professor Lederman and others, and try to incorporate that into any revisions in this paper which might go forward to our Cabinet Committee on the constitution, hopefully before the next meeting, again, of the Ministerial Committee, for their guidance or their consideration.

MR. STEVENSON: But I think, Mr. Chairman, we should get comments from all those who have them right now.

THE CHAIRMAN: If there are.

MR. GREATHEDE: Or have them simply send their drafts back with any written comments on them.

THE CHAIRMAN: I didn't know whether there were any other comments here that we could discuss.

PROF. BRADY: I thought, Mr. Chairman, the recommendations were good, and I would agree with them. They might on occasion be phrased a little differently, and supporting data might be presented a little differently on occasions. In other words, I think quite a few words could be cut out and statements made a bit more concise and perhaps elegant. The general content, I thought, was well selected.

MR. DICK: Mr. Chairman, I gather too that the suggestion was that after these gentlemen have had their opportunity in the re-phrasing of the paper, myself and Frank Callaghan and some of the others might also go over it with them.

MR. GREATHEDE: Oh, yes - no question.

MR. DICK: Thank you very much. I will see you get thirty days right off the bat.

(Laughter)

THE CHAIRMAN: That was the first place I really suggested, in due self-preservation. Any other comments on this paper?

That really brings us to the end of the agenda. I do not want to foreclose the meeting and, on the other hand, I do not want to contrive ways of prolonging it either.

I might discuss with you our future plans. In my own opinion, the optimum time for us to meet again would be, I believe, Friday, November 28th, for the reason that the meeting of the Constitutional Conference is the 8th, 9th and 10th December. If we have the meeting just the week before on the 5th, it is a terrible scramble because we are always in difficulties in the last few days before going away on a conference.

PROF. BRADY: Did you say November?

THE CHAIRMAN: Yes, November 28th.

PROF. BRADY: That is the next meeting, and that is two months away.

THE CHAIRMAN: Yes. I say perhaps no earlier than that for the following reason, that we shall have had our meeting of officials and we shall have had the Ministerial meetings and we shall have further preparation. It strikes me as optimum. By that time we would have all the ground work in hand to discuss with you, but still enough time to revise on the basis of anything said here on the Government position for the 8th, 9th and 10th

Finally, I will try, as he wants to do

always on these occasions, to arrange part of that day for the Prime Minister to come - and I would hope your Minister would come, Rendall - to meet with the Committee, when you could tender your advice directly in their presence; because about that time I imagine they will be thinking quite seriously about the imminent events.

Does that seem to the Committee to be Friday,
an acceptable plan of attack -/November 28th?

PROF. MEISEL: It might be useful to drop a note to people not here, because there are so few still around.

THE CHAIRMAN: I think the note should go out forthwith to all of those who are not presently in the room.

Are there any other matters? I hope no one is unduly distressed by adjourning now. On the other hand, if there are matters that you wanted to discuss individually with the secretariat there will certainly be the opportunity to do so, or if any group wishes to remain to carry on discussions on any point.

PROF. MEISEL: There is a small matter of procedure, Ian. It seems to me that, for instance, this paper on the Supreme Court should really have been looked at by the constitutional committee if there had been time. I think there is much to be said for the committees

giving very careful scrutiny to some of these things.

THE CHAIRMAN: Yes. I wonder about our committee structure. I know, for example, that the cultural and linguistic committee has kept meeting faithfully. We have not done the same with our constitutional committee.

MR. GREATHEDE: We do have the individual task forces, Mr. Chairman.

THE CHAIRMAN: And the task forces I thought might meet in between.

MR. GREATHEDE: It just depends on their calendar of events.

THE CHAIRMAN: Well, this is it.

MR. GREATHEDE: And I am not thinking of ourselves but members of the Committee.

THE CHAIRMAN: When I spoke about the next plenary on November 28th, I should have mentioned that I was assuming the secretariat would be in touch with you about the task forces on specific projects as need be.

PROF. FOX: Some of those task forces are pretty small now and we have not met for some time. For instance, the task force meeting on the Supreme Court will be Bill Lederman and me. Wasn't Mr. Magone the other member? No, maybe Professor McWhinney.

DEAN LEDERMAN: Yes, and Callaghan in the Department of Justice.

PROF. FOX: What about the Senate committee? Do we have a separate one on the Senate?

MR. GREATED: Yes, we had a separate one on the Senate.

PROF. FOX: It was small too.

MR. GREATED: I don't think any had more than half-a-dozen members.

PROF. MEISEL: They may be re-cast.

DEAN LEDERMAN: I think we had better send in our comments rather promptly, and then you will have to decide whether you want the sub-committees to come in and give you some help.

THE CHAIRMAN: Well, if there are no other comments, we might adjourn.

-----The meeting adjourned at 2.30 p.m.

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ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

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M E E T I N G

held at

The Frost Building, Queen's Park, Toronto

on

MONDAY, DECEMBER 1, 1969



VERBATIM REPORT OF PROCEEDINGS

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

M E E T I N G

held at

The Frost Building, Queen's Park, Toronto

on

MONDAY, DECEMBER 1, 1969



VERBATIM REPORT OF PROCEEDINGS

ONTARIO ADVISORY COMMITTEE ON CONFEDERATION

Meeting held at the Frost Building, Queen's Park, Toronto, on Monday, December 1, 1969.

PRESENT:

Mr. H.I. Macdonald (Chairman)

Prof. A. Brady

Prof. J. Conway

Prof. P.W. Fox

Prof. W.R. Lederman

Prof. R.C. McIvor

Prof. E. McWhinney

Prof. J. Meisel

Mr. J.H. Perry

Mr. R.N. Seguin

Prof. T.H.B. Symons

Hon. A.A. Wishart

Mr. A.R. Dick

Mr. F.W. Callaghan

Mr. H.R. Hanson

Mr. D.W. Stevenson)) Co-Secretaries
Mr. R.A. Farrell)

Mr. E. Greathed

Mr. G. Posen

Mrs. J. Wilensky

Miss E. Balfour

--- At 2:30 p.m.

THE CHAIRMAN: I am sorry you have a little dislocation. I think the federal-provincial affairs secretariat computer got jammed up with the office pool on the mayoralty race and this is the result.

I would like to mention two absent members in particular -- Professor Creighton who is recovering from an attack of pneumonia, and Professor Forsey who is in the midst of an operation, both of whom send their greetings and give indications of being hale and hearty notwithstanding these little interruptions along the road, and who are looking forward to being back with us.

On procedures for the day, we will at some point perhaps get back to our original place. I thought this afternoon we might have a committee of the whole, as it were, and have a general discussion on the particular items which we are preparing to deal with at the constitutional conference next week.

We have timed the meeting today to the convenience of the Prime Minister, and also to have a dry run, as it were, at the matters which will come before us next week.

I am sorry we have lost a little bit of time now, but perhaps we can work till about five-thirty or quarter to six, and then we will take a break. The dinner meeting with the Prime Minister is six-thirty for seven p.m.

Ed, do you have any matters of administrative

detail?

MR. GREATHEDE: Simply, Mr. Chairman, that Mr. Robarts' room in the Westbury Hotel is Room 955, where drinks will be served before dinner. The dinner itself will be in the main ballroom. So that if members, after we break up at five forty-five would stroll over to the Westbury, that is where we will be.

I have some suggestions about the agenda, Mr. Chairman.

THE CHAIRMAN: I think this would be the appropriate place.

MR. GREATHEDE: The agenda that was sent out, particularly item number 3, was based on the last word we had received at that time on the agenda for the constitutional conference next week. That agenda has now been finalized, and I thought that we might follow the agenda we follow next week in Ottawa, starting out with topic number 1, the division of powers, and under the division of powers three sub-headings:

- (a) income security and social services
- (b) the spending power, federal grants to provincial governments
- (c) taxation.

Item number 2 on the agenda will be regional disparities. Item number 3 will be the reports from the various committees of Ministers. Item number 4 will be a future programme of work.

Item number 5 will be other business.

I think, Mr. Chairman, if we could substitute that agenda for our item number 3 on the agenda sent out with the letter of November 18, that might make our work a little easier.

THE CHAIRMAN: Is that agreeable? Then during the afternoon Mr. Greathed and the staff are going to try to keep a record of particular items that arise out of these particular points that we think are points that we might review with the Prime Minister tonight, and he has one or two other things to review with us as well.

If there are no other preliminary remarks, and I believe there are not, we might go on to item number 2, which is a report on recent meetings connected with the constitutional review, and I might ask Mr. Stevenson or Mr. Greathed if they would perhaps bring us up to date on the substance of the meetings at the ministerial and at the official levels that have taken place since we last met in September.

MR. GREATHED: Mr. Chairman, under item number 2, I will report only very briefly. Perhaps before I begin, I might suggest that the folder that has just been put in front of you follows the agenda, as you will see, for next week's conference, and under each sub-heading we have attempted to give a resume of the discussion that has taken place to date on that particular subject. Then we have

gone on to suggest some other possible approaches which Ontario might consider at the conference next week. So you will see this division under each of those particular headings.

I will not comment in great detail on the meetings that have taken place in the last couple of months, because we have provided, particularly under the income security heading, under the spending power heading and under taxation, a fairly complete resume of the discussion to date. I thought though that I must just say briefly that since you last met on September 26th the Continuing Committee of Officials have met twice, the end of September and early October, and in mid-November. The two sub-committees of the Continuing Committee on sales taxes and death duties met on one occasion in October and their report is noted in the little item you have in front of you under the taxing powers.

The ministerial committees on fundamental rights, on the judiciary and official languages, met in early November. I thought I might briefly report on the ministerial committees as we have not provided any resume in those reports for you this afternoon, and just deal very briefly with each one, starting with fundamental rights.

When the Ministerial Committee on fundamental rights met in early November, the McRuer report number two had just been published, which contained Mr. McRuer's observations about a national

Bill of Rights as well as a Bill of Rights for the province. So I might just say that that somewhat coloured the discussions of the meeting, as this was by far and away the most trenchant commentary that had been received on this question since the discussion really began.

I think it is fair to say, Mr. Chairman, that at the Ministerial Committee on fundamental rights there is still some outright opposition to the principal of entrenchment. It comes basically from British Columbia and Alberta, although Nova Scotia, I think, has still very severe reservations. I think largely their concern is that the federal case for entrenching has not been proven, and until more substantial evidence has been advanced than has been advanced to date, they are rather leary about committing themselves very much further to the idea of entrenchment.

Those provinces, such as Ontario, which, following Mr. Wishart's statement of February 1969, have committed themselves somewhat on the principle of entrenchment particularly, and especially on the question of political rights, had continued to show some concern about going any further before there is discussion, and indeed before there is some idea of the shape of an amending formula.

On legal rights, I think there is even less support than there is of political rights regarding entrenchment, but I think we did detect

at the meeting in Ottawa that there was some consensus of the idea of adopting parallel federal and provincial legislation in this area to achieve some uniformity.

The federal government is still after the idea of entrenchment of this particular area, and towards the end of the meeting, if I recall correctly, they even proposed this idea as an alternative to the enactment of parallel federal and provincial legislation.

I think generally there was not a great deal of progress made at this second ministerial meeting on fundamental rights. There was re-confirmation of the agreement that was achieved at their first meeting, that there should be provided in the written constitution some guarantees for freely-held elections at maximum intervals of five years at both federal and provincial levels.

I think there is still a great deal of discussion to go on, particularly in the areas of political and legal rights, and we have not really touched on the areas that the federal government set out in their original charter document, before there is any reasonable form of consensus on this question of fundamental rights.

As to the ministerial meeting on the judiciary, which followed right after the one on fundamental rights, we had received a day or so before, in .

translation, the Quebec paper on the case for a separate constitutional court, and as delegations had only had copies a day or so before there was only really preliminary discussion of it at the ministerial meeting. I did not personally detect -- and Mr. Macdonald and Mrs. Wolensky were there and can confirm this for me -- I did not personally detect a great deal of support for the Quebec position. I think there would be some fairly intelligent questioning of the case that they were trying to advance, but I think the conclusion was that the delegations would have to have a great deal more time to look at this question. The suggestion has been made that by January Quebec will have submitted any additional information it thinks that the committee ought to have. Other governments will submit their own views on the Supreme Court by the end of January, so that the ministers when they next meet in the spring (if the Prime Ministers continue their mandate) will discuss other provincial views on the Supreme Court, the federal government's views, and further discussion of the Quebec paper.

The third meeting, which took place in early November, was the meeting of the ministerial committee on official languages. We received at a confidential briefing session the evening before the meeting, the federal proposal on this which, it was announced at that meeting, would be tabled in the House the next day. This announcement, without any

prior notice of this fact, was greeted rather sourly by the provinces, but this was just one of the instances of co-operative federalism, I suppose, that we have to put up with in this country from time to time.

I think we are fairly happy with the federal proposal basically, in that it did come fairly close to our own, in that it provided not only for minority language education as provided for in the B and B report, but also it indicates some willingness to talk about financial assistance for second language training, on which Ontario too has laid a fair amount of emphasis. I think we were quite pleased that their proposal happened to coincide with our own.

As you know from that proposal as Mr. Pelletier tabled it in the House on November 6th, there was basically the suggestion that the federal government would be willing to provide up to \$50 million. The proposal contained no information as to how this \$50 million would be allocated either among governments or as to particular subject areas, although it did twin the proposal of \$50 million to the twelve recommendations in book 2 which were related to such questions as minority language, schools, teacher training, university education and the Language Research Council.

The general reaction, I think, the following day in the ministerial committee, to the federal proposal, was one of hope mixed with a good deal of

disappointment that the federal government had not been more specific in saying who was to get what and for what. They had sort of spelled out a very general figure, though there was some doubt as to how they had arrived at it, but Quebec expressed a number of reservations. I think they are pretty cool to the wording of the federal proposals because they say there is too much potential interference with the field of education. I think they were particularly concerned about such items as the Language Research Council, which perhaps would be a federal government agency. Both Ontario and Quebec at the meeting argued that any payments to the provinces in this area should be in the form of unconditional fiscal transfer and, of course, the federal government has not committed itself on this particular point but it was in line with what the Royal Commissioners recommended, in terms of suggesting that any transfers be made without strings.

The future of this committee, I think, will be largely in the area, once financial proposals have been settled and the discussion between the federal government and the provinces have already started on the financial proposals and will, I presume, continue into the New Year; but the future of this particular ministerial committee on official languages is likely to revolve around the question of constitutional guarantees for linguistic rights. I think on that particular question there are going to be some very difficult problems indeed, but I think basically

the committee has that left on its agenda and that only.

Mr. Chairman, that is my report on the ministerial meetings and, if you like, we can move on to the other areas.

THE CHAIRMAN: The final ministerial committee is the Senate, but there seems to be an increasing disinclination to change the Senate, if one can judge by the pace of the committee, in that it did not meet and no new work has been performed.

MR. GREATHEDE: The federal government postponed that meeting or requested the postponement of it, because they said their position was not ready yet, but we have been assured that it will meet early in the new year, presumably before the spring.

PROFESSOR BRADY: Who presides at the committee on the Senate?

THE CHAIRMAN: Mr. Kierans?

MR. GREATHEDE: Mr. Otto Lang is in the chair, and Mr. Kierans and Senator Martin are the other two representatives from the federal government.

PROFESSOR SYMONS: Mr. Chairman, might it be possible to have a copy of Mr. Pelletier's statement in front of us during the discussion this evening?

MR. GREATHEDE: Yes.

THE CHAIRMAN: We should also make available to the Committee -- I am sure you have got it in hand because it would be of interest -- the report the

Prime Minister gave to the Legislature a couple of weeks ago on the involvement of Ontario in the constitutional discussions.

MR. GREATHEDE: Okay.

THE CHAIRMAN: Which will be of interest to members, for it was alleged that Ontario was not taking a very active part in this process, and the Prime Minister addressed himself to that accusation in the Legislature with a rather full report on exactly what we had been doing, which will be of interest to you, I know.

Are there any questions or matters of note arising from the reports on the work to date?

MR. PERRY: I wonder if anything can be said about the mood of the Quebec representatives in these meetings? If it is going to be embarrassing, let us not say.

THE CHAIRMAN: No, I am just pondering it.

MR. McWHINNEY: Who were they? Perhaps that is the key in each of these committees. Are they an uneasy coalition of both wings of the Union Nationale?

MR. GREATHEDE: The official languages group was led by Mr. Tremblay. I should have the list in front of me but I do not. I cannot tell you all the names. On the judiciary it was Remi-Paul and Mr. Maltais.

MR. STEVENSON: And that was the same group for fundamental rights, too. I do not know

that there is much I can add. In the committee discussions they have always participated very fully and very forcibly.

MR. GREATHEDE: We have had no indication that they have been reserved in any way in putting forward their position. Mr. Tremblay was certainly very forthright in his comments, and Mr. Paul and Mr. Maltais certainly expressed themselves.

MR. STEVENSON: What did they say about the proposal on languages?

MR. GREATHEDE: They were cool not so much to the principle or the idea of the federal government making this offer; they were just a little concerned -- and when the proposal is distributed perhaps you can see their own reasons for that -- they were somewhat concerned that the federal government's actions would result in greater interference in the field of education. I think particularly in university affairs they were most concerned about this element. I do not think there is any question that they will seek some federal financial assistance, but I think they certainly want it on their own terms and without any strings attached whatsoever. Mr. Tremblay made that very plain. In that respect, however, it does not differ a great deal from what Ontario has said.

PROFESSOR McWINNEY: When were these federal proposals put forward first?

MR. GREATHEDE: They were given to us in a confidential briefing session on the evening of

November 5th, at which time we were told they would be tabled in the House of Commons next day.

PROFESSOR McWHINNEY: That is actually after Bill 62 and 63 were tabled, I think, in the Quebec House.

MR. GREATEHD: It is after they were tabled, before they were passed.

PROFESSOR McWHINNEY: So you wonder about the federal judgment in timing announcements of this sort. Mr. Tremblay had enough difficulty accepting this Bill 62-3 in his Legislature. I do not see how he himself could accept a federal proposal in the same area at this stage.

MR. STEVENSON: Talking about timing of the Quebec position?

PROF. McWHINNEY: Talking of the federal position.

MR. STEVENSON: I am thinking about another incident when the Continuing Committee of Officials on the constitution met to discuss income security for the first time, the Quebec government took that very day to make public their proposal on family allowances. Mind you, they were in essence the same proposals that Rene Levesque had come out with four or five years before, but it is part of the game, I guess.

PROFESSOR McWHINNEY: It is a matter of getting the new consensus and the new party.

THE CHAIRMAN: Of course, that has been

one substantive, additional contribution from Quebec in recent weeks, has it not?

MR. STEVENSON: Except that that was not related to the constitutional discussion particularly. It was an old proposal dressed up and put into a lot more detail for the occasion.

THE CHAIRMAN: I was thinking in terms of Harvey's question about the general mood. It seemed to me to indicate no slackening of determination to present the Quebec case in one form or another.

PROFESSOR SYMONS: Mr. Chairman, can we be quite clear that there was no consultation, even of an informal nature, between federal officials and provincial officials before the evening of the 5th?

MR. GREATHEDE: That is correct.

PROFESSOR SYMONS: No consultation of any sort with any of them?

MR. GREATHEDE: They had perhaps last spring -- in fact they had urged last spring at a couple of meetings (Charles is not here but he would confirm this, and I am almost certain of this) urged that the provinces get in specific submissions as to their financial requirements and extra financial assistance they would require and under what terms; and they had promised that when the submissions were received, or when the bulk of them were received, they would be submitting their own proposals. To the best of our knowledge they were working with the proposals over the summer, but they were not in touch with us then,

and they did not get in touch with us prior to the evening of the 5th.

MR. STEVENSON: They got some Ontario proposal about ten days before that.

MR. GREATEHED: That is correct. Mr. Davis wrote to Mr. Pelletier with the Ontario proposal.

THE CHAIRMAN: Maybe that is why the federal proposal resembled ours after all. (Laughter)

PROFESSOR McWHINNEY: Some of these things seem quite old hat. I am sure the Quebec position on the special constitutional court has not changed fundamentally from Gerin-Lajoie's ideas on this five years ago; but it is on the official languages issue that you can regard this as an extraordinary example of timing. It was touch and go at one stage whether you would get a majority in the Union Nationale in support of Bills 62-3, simply because of the internal complications.

One always understood that Tremblay was opposed to any action at the provincial level. I would think the federal proposals, if they were ever known publicly, would be just dynamite at this particular stage, certainly up to the time of the passage of Bills 62-3. It does seem to be a very deplorable sense of tactics in the handling of the timing. It is the sort of issue that perhaps ought to have been let go over until the new year, in view of the peculiarly delicate position in Quebec on that

very issue.

MR. STEVENSON: Although I think it is true to say that the federal people had said as long as a year or so earlier they would be prepared to consider some financial assistance, and we discussed it here (the provinces) for minority language education; and that I think our delegation to the early meeting of the official languages sub-committee had hoped that the federal people would be coming forward much earlier with some ideas of the type of assistance they would be prepared to offer. In one sense I think we were happy to have a proposal at least, certainly not delayed any longer, although there was certainly, I think, a feeling among all the provinces that the proposal need not have been made public the same date, that there could have been discussions of refinements of it, this kind of thing, before anything had hit the House of Commons or the press.

Would it be possible for you, Ted, to give us a brief report on the status of the Royal Commission in Quebec on the language question?

PROFESSOR McWHINNEY: Yes. Perhaps the reporter had better refrain from taking this.

--- Off-the-record discussion.

THE CHAIRMAN: Thank you very much, Ted. Perhaps we might go back on the record now, and come to our main item on the agenda, which is to work through the topics for the meeting next week.

I feel that we are really into the main game

now, as it were, in terms of these discussions. These items which will come up at the conference next week are very specific, very fundamental, very far-reaching and very technical. Therefore, we are doing a lot of work here and we will try to carry on with some of this briefing tonight with the Prime Minister on some of these points which are, as I say, quite complicated in their implications.

As Ed Greathed indicated, the final agenda for the meeting next week is now divided into the following items. The first item is division of powers, which is an omnibus heading including (1) income security and social services, (2) spending power and (3) taxation. The second item is regional disparities; the third is "report from Committees of Ministers". The fourth is "future programme of work" and five is "other business".

So I think the main item now is this three-part division of powers topic, of which the first item is income security and social services.

A few days before the officials met two weeks ago, we received a federal paper on this subject, and that federal paper will be published this Thursday in one of those red, white and black booklets. It will be item 1 on the agenda, and I think the intention of the federal government is that it should occupy a good portion of the agenda.

Having had access to that paper for such a short while, we are at a very preliminary stage in our

own preparations of an Ontario position paper on this, and the paper which is here this afternoon, Ed?

MR. GREATHEDE: That is right.

THE CHAIRMAN: -- I might say it is not marked confidential but it should be treated as such, because it is also only under discussion before the government at this time, and is certainly nowhere near being approved or official.

MR. GREATHEDE: If I could just say so, Mr. Chairman, as you have indicated the Continuing Committee of Officials had their first discussion of this on November 17th to 19th. The members of the Advisory Committee got a copy -- at least, I hope everybody got a copy -- of the federal paper shortly thereafter. What is in front of you now, set out on page 3 and running from page 3 to 9, is a summary both of that very long federal paper which you got along with some commentary on the discussions which took place within the Continuing Committee of Officials between November 17th and 19th; and from pages 10 to 13 is a very preliminary Ontario view of this paper, and it is on that that I think we would appreciate the members' views particularly today.

THE CHAIRMAN: Not just a view of this paper but a view of the subject.

MR. GREATHEDE: View of the subject, yes. Unfortunately we just could not get this material out in advance because of the time; and I think, if you like, you could go through pages 3 to 9 first, which

give the view of the subject and also a summary of the discussion to date; and, having done that, having had some discussion, perhaps Mr. Chairman you would want then to go into the preliminary Ontario paper.

THE CHAIRMAN: Yes. I think perhaps what we really want to do primarily is to get the benefit of your thinking on the Ontario paper, because we are very much up against the time; and what we deal with when we go through the Ontario paper, we will deal with our own views, such as they are, and also we will touch upon the positions taken by the federal government.

Perhaps Don, since you are quite familiar, I think, with the federal view, you would not mind taking us through it first of all in summary.

MR. STEVENSON: All right. Have most of you had an opportunity to read or skim through that long document that you got the other day? In that case I think I can skip pretty quickly past it.

The first part of the paper deals with definitions, and the federal people decided that they might best try to divide the whole subject of social security into two basic headings. The first is income security, which they define as

"a combination of measures designed to
"protect the standard of living of
"individuals and families by augmenting
"their income when it is insufficient to

"provide the needs regarded by society
"as being basic, or by replacing their
"income when it has been lost due to
"such contingencies as unemployment,
"accident, sickness, disability, age,
"or the loss of the breadwinner"

In turn, they divide that income security definition into two. One is income support measures such as old age security, family allowances, programmes like this; secondly, income insurance measures such as hospital insurance, unemployment insurance -- some kind of programmes which have relationship between benefits and the payments into them.

PROFESSOR FOX: Mr. Chairman, may I just ask you if you prefer us to make comments after your review, or as we go along? I have a question there.

MR. STEVENSON: Perhaps as we go. We spend at least half a day on definitions in our discussions.

PROFESSOR FOX: I am puzzled a bit by their inclusion of old age pensions within this section. I see their argument for it, but it would seem to me it would also fit within social services. Is this a point worth noting, or may we dismiss it? I think you can see why, for obvious reasons. In other words, after you terminate work, why is it really an income support? Surely it is a social service benefit that you earn, and it might have been included in the second category rather than the

first. It is clearly a substantial item. If it is not worth discussing, just say so.

MR. STEVENSON: This is the gist of the kind of comment I think we were making, that the division which the federal paper makes is perhaps increasingly artificial for the kinds of new programmes that are being developed where you combine perhaps two or even three of the basic categories that the federal government has come up with.

I think we used as one example payment for additional leave to pregnant mothers. Suppose the government introduced this. It would depend on how it was financed, whether it might be income insurance or income support.

PROFESSOR FOX: This will really take you into a discussion of your paper, though, will it not, so perhaps it should be reserved.

MR. STEVENSON: It might. Very well, I will go through it very quickly but then we might perhaps discuss problems of definition as we move along, because this undoubtedly will be a focus of the discussion with the federal people too.

PROFESSOR LEDERMAN: May I just make one comment on definitions. If you are going to break this field up into several categories -- and I think it is a legitimate thing to try to do -- the use of the word "social" is a trap, because it is the adjective for "society", it is the whole thing. It

should either be modified by further words -- this is Paul's point -- of social services ---

PROFESSOR McWHINNEY: What consequence has come from these definitional categories? Do legal consequences arise from the allocation to the respective governments?

MR. STEVENSON: Allocation of responsibility.

PROFESSOR McWHINNEY: Then I suppose we have got to give prime attention to the definitions.

MR. STEVENSON: They are really key, although when you come down to the recommendations, the bulk of the whole theory becomes concurrent except for this area of social services, particularly those programmes involving direct contact with individuals, and involving counselling, case work, this kind of thing, health and welfare security per se, which the federal government is content so far to leave with the provinces. However, they have come back with us so far when we started to criticize definitions and bring up problems of programmes causing definitional boundaries, saying, "Well, if we really followed your logic, everything should be concurrent, and perhaps we had better take back that offer we gave you of leaving social services with the provinces."

PROFESSOR McWHINNEY: Would you object to concurrent powers?

MR. STEVENSON: We have a problem here. While on the one hand saying that new programmes

which are contemplated for the future -- and I think if you read any of the current debates or books about the types of social security programmes likely to be introduced over the course of the next generation or so, you will find that they tend to become much more comprehensive than past programmes which are much more specifically oriented.

PROFESSOR FOX: But that does not mean they are social services.

MR. STEVENSON: Not necessarily. Guaranteed income is income support, but on the other hand there is a strong reaction to the guaranteed income people by people who say that it is getting rid of alienation in society, which should be one of the main aims of government social security and social service programmes, and there must be more individual contacts perhaps tied in to a broad income support programme.

PROFESSOR McIVOR: Let us go back to Bill's point here. The federal brief starts off with the comment that such a broad range of programmes comprehends both social and economic measures. In reading through there I just do not see any logical division of the social and economic categories: it is just one big, grand, blurred mixture.

THE CHAIRMAN: I agree. If you take the last line of income security it talks about the loss of the breadwinner. If you take the second last line of social services, it talks about the family

losing the means of livelihood. What is the difference between that and the loss of the breadwinner who is presumably the means of livelihood?

PROFESSOR McIVOR: They are just extremely arbitrary and sometimes not very clearly put.

MR. STEVENSON: We did get the impression from the federal paper, I think, that it was geared a little too much on the current programme structure and the current allocation of powers within them, and any current problems in the present allocation. It worked backwards from there through a set of definitions to justify the current split. If you look at it, certainly from more abstract, logical terms, I am sure you will end up with a very different paper than this.

PROFESSOR BRADY: It would be very wrong perhaps to base a distribution of powers on present categories, kinds of services, because the history of social services over the last thirty-odd years has demonstrated (if it has demonstrated anything) how concepts and categories have changed very considerably. They are likely to change in the future with change in the type of society and in the relation of individuals to it.

Also the emergence of new concepts of using taxes surely will have their effect upon categories to which you may now attach importance. I suppose this type of problem came up in the discussions, did it not, Don?

as what I noticed going through, where all along in the federal position they are talking about income support measures, and say that it is desirable that the Parliament of Canada should have equal powers to make income-support payments for various reasons, and they proceed to develop a rationale, one of the categories in which was what they call the income redistribution reason; and you

find down in Part IV they are talking about what they call an economic policy reason. If the income redistribution reason does not involve very closely the whole business of economic policy, then ---

PROFESSOR LEDERMAN: I got the impression that the purpose of the federal categorization -- in criticizing the use of the word "social" I was really just making a preliminary point that they ought to have entitled their categories in a more meaningful way; but the impression I got going through the main federal paper was that the basic purpose of their categorization was to meet the Quebec contention that social security is part of the whole cultural way of life; and they are saying that when you are simply adding to a family's income and leaving it to the family to spend their money, you are not interfering in the cultural ground. On the other hand, you are dealing with a "social service" in which social workers are going out and counselling is going on, and administrative discretions are being exercised.

THE CHAIRMAN: Human contact and so on.

PROFESSOR LEDERMAN: Yes. So they can concede the Quebec point, but they are saying that when you are merely augmenting income, and you are not playing any kind of cultural game, but you are leaving it to the family to spend their money as they see fit.

MR. STEVENSON: We have problems in this

one too, but we will come into this later, because essentially it is difficult to debate that logic too hard. I think in our own discussions as to what kind of Ontario position should be developed, we almost automatically started with these two premises: that a personal kind of programme should be provincial or local, and ⁱⁿ the more impersonal cheque-writing programme. There is a much greater rationale for central function.

Then you get around to the very legitimate questions of Quebec and of ourselves, that if the income-support programmes are geared too high by the federal government, there is just a straight pre-emption of the whole field in fiscal terms. The federal people keep saying to Quebec: "If you don't like the way we are having our family allowance programme structured, then you are quite free to add whatever kind of payments you want to benefit families with many children."

Quebec, of course, as any other province would say, says: "You get out of the field so that we can have a little money to do it."

The same, of course, with old age security or any kind of guaranteed income security: if the federal payment goes beyond what would be generally recognized as a pretty absolute minimum, then there may not be very much room left for any province to make allowances for regional differences, for changes in the structure of the programme, and it

may actually tie it in with the cultural objective, as the Quebec government would argue is their objective in their proposed structure of the family allowances.

PROFESSOR FOX: Don, one clear thing that emerges in my mind is whether or not it is wise to begin with definitions at all; because if you begin with their definition, you are locked into certain conclusions. Therefore, perhaps the most effective way is to suggest another approach.

MR. STEVENSON: Perhaps I might skim very quickly through what we have here so that you have a little more of an over-view, and we can come back to many of the points.

PROFESSOR McWHINNEY: Just following this thing through, your lawyer today would begin with the problem and reach definitions at the end. I suspect the economist would too.

MR. STEVENSON: I must say that was my automatic approach in thinking of it.

PROFESSOR McWHINNEY: I wonder, if one reaches the same conclusion again, whether you cannot press this.

MR. STEVENSON: To go on perhaps, pages 3 to 6 of what is in front of you is essentially a short summary of the federal paper. Any of you that have not had a chance to go through it might want to skim it briefly.

3 and 4 essentially outline the definitions.

The bottom part of 4 just mentions the second large section of the federal paper, which is an historical review of the whole treatment of social security since Confederation.

Then at the bottom of page 4 and top of page 5, the summary of the federal recommendations which I might repeat: that the provincial legislatures ought to have exclusive jurisdiction for social services; that Parliament and the provincial legislatures ought to have equal powers to make general income support payments to the provinces.

Here the point came up: do you want to put any paramountcy into this? The federal people said: "No, we do not see any need whatsoever for having a paramountcy provision in that concurrent section, if it is just payments to individuals or use of the spending power".

PROFESSOR McWHINNEY: Of course, they are preparing on the assumption that without a paramountcy provision it will be concluded automatically that the general federal paramountcy prevails.

MR. STEVENSON: Yes, we argued too about the implicit paramountcy on an allocation of fiscal resources, which they dispute most strongly, and they will not recognize this at all.

We had a great time using some of the arguments of several members of this committee on the desirability of having a paramountcy section on any concurrent field, which the federal people and

their constitutional advisers do not accept.

" (c) That parliament and the
"provincial legislatures ought to have
"concurrent powers in respect of the
"income insurance measures, except that
"unemployment insurance ought to remain
"exclusively federal and workmen's
"compensation to remain exclusively
"provincial".

In respect of retirement insurance and associated benefits, after some discussion we got from them the point that they were speaking only of public retirement insurance at this point, although I think in their earlier drafts they were thinking of regulation of private pension funds too -- ought to remain concurrent but with federal paramountcy.

PROFESSOR FOX: You mean the CPP?

MR. STEVENSON: CPP.

PROFESSOR FOX: What are you going to do, repeal 94(a)?

MR. STEVENSON: Presumably, yes, although this provoked another fascinating discussion, because we said: "Well, that would mean changing current provincial paramountcy to federal paramountcy", and we discovered to our amazement that the federal people do not recognize that 94(a) gives the provinces paramountcy.

PROFESSOR FOX: That is interesting.

MR. POSEN: They said the wording was not

the same as in 95, and therefore they were not going to ---

MR. STEVENSON: We had a nice long argument on this. I certainly had just assumed that this was a starting point for discussion in that field.

PROFESSOR McWHINNEY: If they do not accept this, you had better insist on it.

MR. STEVENSON: Certainly Quebec and ourselves said: "Have you read the discussion at the time 94(a) was drafted?"

PROFESSOR McWHINNEY: To make assurance doubly sure, you have got to insist on it for the future; you insist it has always been so.

MR. POSEN: Their statement was that until it is tested in the courts they would not assume there was.

PROFESSOR FOX: That is ridiculous.

PROFESSOR McWHINNEY: Trudeau was just saying the other day that the Montreal by-law was unconstitutional. I think somebody said: "Wait till it is tested in the courts", and they seemed to accept the argument. We shall be very interested to get a little additional support for what we thought was our position there, that 94(a) implies provincial paramountcy.

At the bottom of page 5 it goes on to point out that this would presumably require an amendment to section 94(a), and it also points out that the federal people have indicated that their agreement

to leave the provinces with the exclusive jurisdiction over social services was a major concession on their part.

Then we put as the final sentence here:

"However, some of the recommendations and "the reasoning behind them emphasize the "need for agreement on limiting the "federal spending power and on reaching a "more equitable tax-sharing arrangement" because even in the areas, of course, of social services, the federal people said that if there is a national interest apparent in any area in this field, then the federal spending power, of course, would be applicable and you might have a solution either by direct federal payments to individuals and institutions, or a shared-cost programme initiated under the limitations of an agreement on the federal spending power.

"Finally, because the paper makes no "attempt to look at the future, Ontario "might want to reserve final comment until "the federal white paper on social "security has been released"

We had hoped that this might be at least tipped off at the same time. Originally we felt that perhaps the federal white paper on taxation, the federal white paper on social security, and the federal constitutional paper on income security would come pretty well simultaneously, so that we could get an

idea, at least for the short run, how the federal government is presently thinking of using a concurrent field; because I think we felt very strongly internally that if the field is to be concurrent, then for the short run at any rate so much depends on the merging, planning philosophies by each level of government in this field, both in the taxation area and here.

The federal white paper on taxation disappointed us a bit, because it made no reference to including family allowances in income, saying: "This is a matter we will leave over until the federal policy paper on social security comes forward". So their hand has not been tipped.

MR. PERRY: I asked Benson why he had not paid more attention to the social security side, and he said: "Those other guys are not going to be ready for months. I cannot wait for them."

MR. STEVENSON: We asked him the same thing, and the federal civil servants told us that the white paper might be available some time this winter, but the financial people said they would be lucky if they had it within a year.

MR. PERRY: Winter of 1970. A good project for the 80's.

PROFESSOR FOX: Do you want any comments on the style as we go along? I mean, is this a draft of your ---

MR. STEVENSON: No, this is a draft

purely for your benefit which Ed's people have done to summarize the federal paper in discussions so far. This will not be reproduced any further.

Starting at page 6 there is a short summary of the discussion in the Continuing Committee meeting, and I think, as Ed said, we had received this paper with about the same advance timing as you had received it for this meeting.

THE CHAIRMAN: Which we thought was to give you the same parity of approach. (Laughter).

PROFESSOR FOX: So that we wouldn't be any smarter.

MR. PERRY: You didn't have the Grey Cup game on all afternoon.

MR. STEVENSON: The discussions centred on the definitions on the economic policy reasons which the paper uses to justify federal presence in the field of income support, and the proposal that Parliament's powers should be paramount with respect to public retirement insurance.

Then, as the bottom of page 6 points out, Ontario and Quebec particularly spent quite a bit of time on the definitions, saying that they seemed to be geared much too much to the past and present structure of programmes, and would probably prove a little rigid for the new kinds of programmes that are now being considered.

The federal people have replied that their proposal for concurrence allows for great flexibility.

The reply to that, of course, is that many existing programmes combine elements of one or more of the federal categories, and some of the ones in the future most certainly will; so if you split it up into definitions this will not be accounted for.

There was quite an interesting discussion starting from the point that we should divide between personal and impersonal services. The Quebec Director of Planning for their Welfare Department was suggesting that you should try to divide more between the nature of services from their objectives, services that ---

PROFESSOR FOX: Function.

MR. STEVENSON: Yes, I am just trying to follow his argument here. Ed, do you remember that one that Beausoleil was making? However, we will leave it for the time being. He did not develop it at all, but he was trying to work out a new basis for definitions.

PROFESSOR FOX: It was not a function of the service?

MR. STEVENSON: Essentially it was, but this could lead you into the same kind of thing that the federal people ended up with.

Seven goes on to discuss a bit the federal economic policy reasons. Here we got into the old arguments of the share of the personal income tax; and, of course, behind a good deal of the federal argument is their straight unwillingness

(which they have expressed many times in the past) to turn over the amount of financial resources required now for old age security and family allowances, which has been at the heart of the Quebec position all through the 1960's, the Quebec people and others saying that this was not really an argument over the nature of social security or the programmes here, but perhaps a political argument over the share of the personal income tax that you felt you had to have before you could rationally raise or lower the rates to have a significant enough impact on fiscal policy generally.

Ontario, you may remember, in opposition to the economic sub-committee's recommendations, suggested a couple of years ago that the federal government could still have a sufficient stabilizing role with a considerably smaller portion of the personal income tax than 50 per cent. I think the federal people have assumed that they must have at least 50 per cent if the kinds of increases and decreases in rates that they may want to make at different times of the cycle would be significant enough to affect overall fiscal policy.

The Quebec people have said that there is a very clear boundary on the amount of money you have to spend for these programmes. They depend on the existence of people, and the federal government is not able to turn on and off the tap of old age security and family allowances at will at

any rate; so turning it over to another level of government to make the payments will not affect its capacity to make fiscal policy changes.

MR. PERRY: A completely irrelevant argument.

MR. STEVENSON: It has been one of their arguments all through the piece.

In point (c) at the bottom of 7, we get into the retirement insurance arguments. Quebec argued quite strongly that the current Canada Pension Plan, the Quebec Pension Plan, was significantly superior to the original federal proposals for a Canada Pension Plan, and that it was superior only because of provincial paramountcy, which gave the provinces leverage in the discussions to arrive at something which was not purely a unilaterally dictated federal programme.

I think this is a qualitative judgment of what you think of the two plans. I think most of us in Ontario probably felt that the current Canada Pension Plan had considerable improvements in some areas over the original federal one, although there were some drawbacks also; but there is no question that the federal-provincial consultation that took place derived meaning from the fact that the provinces did have paramountcy and therefore were capable of making the threat good that they would establish their own plans if a compromise was not arrived at.

PROFESSOR BRADY: It is an odd position for the federal people. Perhaps the lawyers here could talk about this with more force, but I had assumed from the discussions back in that period that there was a recognition of the fact that the provinces were acquiring paramountcy under 94(a).

MR. STEVENSON: Carl Goldenberg was making a number of points about how you define paramountcy. Does paramountcy only relate to new programmes, or does it start from the base that existing programmes are exempt?

PROFESSOR McWHINNEY: You mean in legal terms? Unless it has a time specified for commencement, it is operative from the beginning, ab initio -- unless it positively specifies it is only to operate in the future or from its determinate date, the ordinary construction is that it operates from the beginning.

MR. STEVENSON: I think it might be very useful if this Committee or one or two members of it were to assist us generally with the definition of "paramountcy".

PROFESSOR McWHINNEY: Did I see Frank Callaghan disagree? Were you disagreeing there?

MR. CALLAGHAN: No, I was answering a question here.

PROFESSOR McWHINNEY: I am sorry. You were speaking with animation, and I thought it might be dissent.

MR. CALLAGHAN: No.

PROFESSOR McWHINNEY: You would agree with that, I am sure.

MR. CALLAGHAN: Certainly.

PROFESSOR McWHINNEY: Then you make a majority.

PROFESSOR FOX: The question is does paramountcy mean not paramountcy?

MR. CALLAGHAN: I have never said there is any problem in section 94 until somebody expressed an opinion maybe there was, but I cannot see it myself.

PROFESSOR LEDERMAN: It strikes me, offhand, this way. When you talk about simple tax collection, getting in money, you could have concurrency there without conflict for a long time, I suppose as long as the taxpayer has money in his pocket to pay the two collecting governments. The only place you come to a paramountcy issue in taxation collection problems that I know of is where you have a bankrupt estate.

PROFESSOR McWHINNEY: Well, ceiling limits.

PROFESSOR LEDERMAN: A bankrupt estate, where there are tax claims and there is not enough money to meet those claims. Then I agree the federal government could give itself priority.

PROFESSOR McWHINNEY: On what basis, Bill?

PROFESSOR LEDERMAN: Well, there is a Privy

Council ---

PROFESSOR McWHINNEY: There is an eminent court ruling in another country on this.

PROFESSOR LEDERMAN: Let me just finish the point I was making here.

PROFESSOR McWHINNEY: I am sorry.

PROFESSOR LEDERMAN: Talking about tax collection, I say you do not come to conflict until the taxpayer runs out of money theoretically, though politically you would come to a realistic point of conflict long before that. The taxpayer would feel over-taxed a long time before the two governments had emptied his pockets.

However, when two governments are simply paying out money with no strings attached, to the head of the family, well, they can continue paying out no doubt, and the head of the family is going to take the cheques from both directions as long as they are coming in. So you would be a long time before you had a conflict, and your paramountcy principles do not operate until you have got a conflict.

The trouble is, as I see it, on tax collection, that there are schemes of tax collection and there is a whole system, and there are assumptions about what you should be doing, there are objectives for a tax system and so on. If you have got two tax systems with inconsistent assumptions and so on, are you not starting to get

into an area of conflict? Getting money in, paying money out, is not the same thing, true?

You have got one system of income support in Quebec which makes certain assumptions, and then an entirely different system of income support which makes very different assumptions. The realistic fact is that there is not enough money in the country in the taxpayers' pockets to run both. Do you not get a conflict there? I mean, the idea of a conflict is a much more sophisticated thing than perhaps the federal authorities are admitting. So if you think of tax collection as a scheme or system with assumptions, with economic and social objectives, and your income support payments as the same thing (systems) does there not have to be one system?

PROFESSOR McWHINNEY: I understand Bill's point. Did you finish that, Bill?

PROFESSOR LEDERMAN: Yes.

PROFESSOR McWHINNEY: But the only authority for legal decision on this issue -- and it has only a persuasive effect here -- is a decision of the High Court of Australia uniform tax case; and it did say that in the event of a conflict with the taxpayers' dollar, where you get a hypothetical situation of ceiling taxation, the federal government has priority; but that was based on both highly specific sections of the Australian constitution and also on the particular conditions, the wartime

situation, when priority was based on the war, the temporary fact situation (section 109 of the constitution).

I would not care to say in the case of any other federal system without these specific provisions, you have to spell out a tax-collecting priority that automatically went to one government rather than another. Why should it necessarily be so, Bill?

PROFESSOR LEDERMAN: I was trying to make first the point that simply getting money in or simply paying it out, it looks superficial, as if you are going to be a long time getting to a conflict -- and you do not have a paramountcy problem unless you have got conflict in the provincial and federal legislation.

Then I went on to the point that a more sophisticated concept of conflict is necessary.

MR. CALLAGHAN: Our courts have never had a very substantive view of what conflict is in Canada; it has been very rudimentary.

PROFESSOR McWHINNEY: And no federal system has had an actual direct conflict. The Australian decision was given on an hypothetical situation when it was discussed "if there should be conflict". I know of no Canadian decision, Bill, in this; and I would say: why, starting from first principles, are you assuming the federal tax-collecting priority? Is this not an issue in the

era of co-operative federalism where you say they work it out?

PROFESSOR LEDERMAN: In the tax collection field there is a Privy Council decision which is quite clear on the point; but in the social services in which you are simply paying out money, my impression was that at the time of the Canada Pension Plan controversy -- Canada Pension Plan versus Quebec Pension Plan -- it was realized that if we did not get the same kind of pension plan, the same scheme in all of Canada, and if you had one type of pension plan in Quebec and different types for the rest of the country, you would Balkanize the economy; and accordingly the two governments, Canada and Quebec, were prepared to go to great lengths (at least the Government of Canada was) to get a uniform pension scheme.

Then section 94(a) says:

"The Parliament of Canada may make laws
"in relation to old age pensions and
"supplementary benefits, including
"survivors' and disability benefits per se,
"but no such law shall affect the operation
"of any law, present or future, of a
"provincial legislature in relation to
"any such matter"

Now, I am arguing straight from 94(a) to say that that means that if you get two inconsistent pension schemes, two systems which are such that they

cannot live together, and they would tear the country apart (and in effect the right to tear up all around Quebec if you have it): if you have inconsistency in that sense, then it says that no federal law shall effect the operation of any law, present or future, of a provincial legislature. Now, is that not provincial paramountcy?

PROFESSOR McWHINNEY: Yes.

PROFESSOR FOX: I would think so, and I would say it would be instructive to compare it to 95 which is in the federal brief. If you look at page 2 at Appendix A, they have 94(a) and 95, and I cannot really see the difference between section 94(a) in terms of the significance of paramountcy and 95 on immigration and agriculture; and if the federal government argued that they had paramountcy in 95, and that the province has not got paramountcy in 94(a) ---

MR. STEVENSON: Yes.

PROFESSOR FOX: They did?

MR. STEVENSON: It was fascinating to hear them. We raised a number of questions on what they meant by federal paramountcy in their proposed division. We said, for instance: "If you have the Canada Pension Plan and the Quebec Pension Plan as now, if you have the paramountcy changed, would this mean that the federal government, should it decide to make any change in the Canada Pension Plan, would decree that the Quebec Pension Plan

would have to be amended to make the same changes, to ensure portability?"; and one of the federal people at least said: "Well, we would not mean this would affect any existing plans. This would only be new regulations", which puzzled me no end.

PROFESSOR LEDERMAN: The catch to that is that when it says:

"No such law --- "

that is, no federal law:

"--- shall affect the operation of any law, present or future, of a provincial legislature ... "

"future" implies provincial legislature.

MR. STEVENSON: Right, but if you change the paramountcy presumably, with federal paramountcy the object would be to ensure a uniform system of public pensions across the country, or at least a portable one.

PROFESSOR McWHINNEY: You mean, if you established a general constitutional principle of paramountcy?

MR. STEVENSON: No, if you followed the federal paper and gave federal paramountcy in public retirement insurance programmes.

PROFESSOR McWHINNEY: Yes.

MR. STEVENSON: Then presumably the aim would be to ensure that you had a nationally portable, if not totally uniform, at least non-conflicting pension scheme.

PROFESSOR LEDERMAN: I want to make my position perfectly clear. I do not like 94(a), I never have and I have said so in print; but I have no doubt what it means, that it means provincial paramountcy. I do not like provincial paramountcy there. I think it should be federal. I have no doubt that it establishes provincial paramountcy.

PROFESSOR McWHINNEY: Until you change it explicitly or by such overriding comprehensiveness in the alternative, the new federal proposal, it is clear there is nothing they can do about it.

MR. CALLAGHAN: I understand Goldenberg has some argument advanced by Laskin. I do not know what it is, I do not understand it, but I understand that it is the basis.

PROFESSOR McWHINNEY: You mean pre-Judicial Laskin?

MR. CALLAGHAN: Yes, it would have to be pre-judicial.

PROFESSOR McWHINNEY: You remember what Justice Robert Jackson said: "Why should I be bothered by earlier partisan advocacy in an earlier lost cause?"

MR. CALLAGHAN: I was in a case recently before Laskin when somebody quoted an article from a law professor, and he said: "Since when do we listen to law professors?" (Laughter)

PROFESSOR BRADY: It seems to me Frank

Scott wrote a brief commentary note in the Canadian Bar Review after 94(a) was introduced and he did not like it any more than our colleague Professor Lederman, but he said that it introduces something fresh in the British North America Act, namely, paramountcy in the provincial legislature.

PROFESSOR McWHINNEY: Why not? In federal terms, you see, the concept of automatic federal paramountcy only applied in a highly Keynesian-oriented system like the Australian one, for example, where you have a specific, explicit paramountcy clause about which there could be no argument, covering everything. Why should it be assumed as a matter of first principle that federal paramountcy is the rule here, and when you have got such a specific provision as 94(a) giving provincial paramountcy in a certain area ---

MR. CALLAGHAN: Would not conflict more than likely arise in the area of portability as opposed to tax collection?

MR. STEVENSON: In this one, yes. This is the basic federal case for advocating federal paramountcy in pensions.

PROFESSOR McWHINNEY: Why do they need paramountcy? You could argue for some sort of faculty provision and beneficial construction. Would federal portability always necessarily conflict with provincial plans?

PROFESSOR LEDERMAN: The case goes further

than that though. If the Quebec Pension Plan is much more expensive for employees and employers than the pension plans in the other provinces, they will lose industry, they will lose people.

PROFESSOR McWHINNEY: It may be marginal, depending on how much heavier it is.

PROFESSOR LEDERMAN: Yes, it has to be different enough, but when there is enough difference that you are starting to pull the economy apart in an economic thing like this, then I think there is a conflict.

PROFESSOR McWHINNEY: I think Don's point though and Frank's (I think you would agree, Bill) that 94(a) clearly establishes that in case of conflict -- provincial paramountcy; but one should not start off in a federal system with an assumption of conflict, and one should construe the federal portability principle in such a way that it does not conflict unless it has to with the terms of the ---

MR. CALLAGHAN: Our Supreme Court, not to say the Privy Council, has given a very rudimentary ruling on conflict, and it has to be an almost direct opposition to legislation before there is conflict.

PROFESSOR McWHINNEY: Sure, there is a collision.

MR. CALLAGHAN: And because they strive to make opposing legislation work, it would have to be a very direct conflict, I think, before they

would ever invoke the provincial paramountcy, if there is one under 94(a).

PROFESSOR McWHINNEY: Surely the federal portability principle would be facilitated in some measure, would it not?

MR. CALLAGHAN: It might be.

PROFESSOR LEDERMAN: They have been going as far as they can to construe against portability.

PROFESSOR McWHINNEY: Yes, this is functional federalism; it is the opposition to the old Aitken approach, where you automatically assume the conflict, you destroy the legislation (one or the other) rather than trying to hold it altogether.

PROFESSOR FOX: Have there been any constitutional cases that have established federal paramountcy in regard to 95? I cannot think of any. If so, you could turn it to your advantage in 94(a).

MR. CALLAGHAN: Recently they have got into problems with grain elevators. I am not sure if there is power in 95. I am not sure how that was evolved. I know there was a problem there.

MR. STEVENSON: The federal paper on page 32 down at the bottom really points out that it is the portability problem which leads them to believe that they must have federal paramountcy. They bring out the extreme hypothetical case that if you had ten different public retirement insurance programmes, you would have to have 45 different inter-provincial agreements to ensure that you would still have

portability among them.

I think both Quebec and ourselves argued that such in fact was not the case; that even if you had provincial paramountcy as you do now, there is such an overwhelming general desire to achieve this kind of portability that you will have a force leading towards a uniform system without necessarily having federal paramountcy. However, certainly there is a case that can be made, and a very strong one, for federal paramountcy. However, we did not accept some of their reasons for making it.

PROFESSOR McWHINNEY: You mean a sociological case for total paramountcy -- well, economic case for total paramountcy, is that what you are speaking of there?

MR. STEVENSON: If you argue that you must have portability in this field, then you can argue certainly that this can be assured through federal paramountcy to a degree much more than if the provinces remained paramount in the field.

PROFESSOR McWHINNEY: Portability simply involves really the concept of vested rights in respect of past payments, past benefits, does it not? Why should that involve conflict normally, any more than it does with university pensions from one province to another?

MR. STEVENSON: It may involve different qualifications for entry into a scheme; it may be waiting periods. There are lots of ways in which

public retirement schemes can militate against portability.

PROFESSOR McWHINNEY: I think you should argue that you will require that demonstrated in a concrete case, such a conflict, without assuming it to be so. It is a common problem in universities.

PROFESSOR McIVOR: I doubt that it would be very hard to demonstrate.

PROFESSOR McWHINNEY: You doubt it?

MR. STEVENSON: Certainly if you move it into the private field, again in the regulation of private pensions we have a perfect case, where these were regulated up until 1959 by the federal government through the means of the Income Tax Act, and the federal government would only approve for income tax deductions contributions to pension plans that met certain basic standards. This was ruled ultra vires the federal government because the courts decided that this was in fact regulating in a provincial field by the use of the federal income tax. So this was the reason for the establishment of the Ontario committee on portable pensions early in 1960 -- the fact that the provinces were suddenly given the field. So what has happened there is that uniform provincial legislation has been established which is now accepted by five provinces and the federal government. So you have quite a degree of portability and uniformity built into the regulation of private pension plans; but you can

still make a quite strong argument that this is perhaps the more inefficient way of doing it than if you had a single central federal regulatory function. I like to argue this as a good case where inter-provincial cooperation can succeed. You still have the problem of a P.E.I. unable or unwilling to set up mechanism necessary to administer an act as complicated as a pension benefits act. However, perhaps we might move on a bit.

THE CHAIRMAN: Where is this taking us now?

MR. STEVENSON: We are still really finishing up the summary of the discussions.

THE CHAIRMAN: I was just trying gently to suggest that we have a long way to go.

MR. STEVENSON: The final page, page 9 of the discussions to date, says:

"The discussion on the determination of
"the national interest is of vital
"importance to the whole question of
"the distribution of powers"

Whenever we get down to this business of how do you define the national interest, we come to an argument because Quebec -- and increasingly Ontario -- have been arguing that in a field assigned to the provinces you cannot assume that the federal government can unilaterally declare that such an aspect of the subject is so much in the national interest that they can intervene. So you have a recognition by the federal government in its

spending power paper that such should be the case; but when you get down to the philosophical argument, you still have most of the small provinces, and to a considerable extent the federal government, equating national interest with the federal government. So obviously we run up against this again.

PROFESSOR FOX: You ground your argument though in the reality of federalism: either it is a federal system or it is not. If it is a federal system, it seems to me to follow logically that the national interest has to be defined as something other than the interest of the one central government.

THE CHAIRMAN: Paul, this thread dominates every discussion -- I think, Mr. Wishart, it is true -- at the ministerial level. It is certainly true in all the official discussions, that is, the equation of the federal government with the national interest, rather than the totality of the components of the federal system. It is the issue, I think, that is being fought out or must be fought out.

PROFESSOR FOX: Yes, that is right, and it is essentially whether you embrace a genuinely federal system or a unitary system.

THE CHAIRMAN: Yes, because I am not going to believe that you might as well in many ways not worry about pretence and go right to the point.

PROFESSOR MEISEL: This is the reaction

that I had in reading the federal paper, and what crossed my mind really was whether there is not some new kind of mechanism that we ought to try to look at which would bring together the representatives of eleven governments to decide certain kinds of issues which are national in the sense that they cannot be left to the definition of the central government, nor, at present, to the sort of free-wheeling bargaining between provinces. I was going to ask Ted or anyone else who knew, whether there were such bodies in other jurisdictions that function in this way. I could not think of any.

PROFESSOR McWHINNEY: In the tax area or loan authority, you have the Australian Loan Conference, which, as you know, is not merely statutory but a supra-statutory constitutional body. It certainly functions along these lines in its areas of competence. It is taken out of the federal domain and taken out of the state domain. I do not know of any comprehensive organization, however, that covers all aspects of policy-making, but it is clearly the way of the future. I suppose, in a sort of primordial way, the Dominion-Provincial Conferences are that, are they not?

PROFESSOR MEISEL: That is correct.

PROFESSOR McWHINNEY: A continuing, if you wish, committee on defining national interest in the comprehensive sense we are describing.

PROFESSOR MEISEL: There are some real

problems in that, though, finding out what one can do when no agreement is possible, and what in fact does constitute agreement -- majority decision among the eleven or what?

MR. GREATED: This is precisely the problem we wrestled with on the spending power in terms of the formula.

PROFESSOR McWHINNEY: This is really the case, you know, why you cannot consider this proposal of the special constitutional court as a judicial proposal or a legal proposal at all. The thrust of all this is that judicial decisions in the Anglo-Saxon type of federalism, are really great policy decisions masquerading in judicial form. This is the reason why Quebec says the legislative determination of the national interest that you get in the Anglo-Saxon world in the great constitutional litigation, is something that should either be handled by a supra-Dominion-Provincial conference with very definite parity between the members, or else, if you are going to go through the fiction of a court, that you have got to radically change the voting power and the composition to reflect this legislative quality.

I think the way of the future, however, is increasingly to take these things out of the Anglo-Saxon judicial domain and push them, in the Canadian sense, into the Dominion-Provincial Conferences.

The successor body to that, if we ever

got a new conference though, would probably follow the lines of this special Australian committee that is really set up as a commission for overseas loans or flotation of loans, and the external credit of the country, standing supra-statutory, a supra-constitutional body really.

I think you have raised a very basic point, John. Perhaps the tragedy in the lack of progress in the constitutional discussions is that none of these ideas are coming from this federal think-tank. They should be; they are fundamental to federalism today, the new federalism.

THE CHAIRMAN: We are in the business here of trying to develop an Ontario position. The federal paper, it seems to me, is based on two factors which are inter-related. The first is an attempt to establish a position which will be workable with respect to the present problems of the Province of Quebec; and the second is to attempt a rationalization of a distribution of powers based on the present kind of programmes and the present kind of existing framework. I think that second point is a product of the first.

The thing we are trying to wrestle with here is whether one can project a bit and, first of all, ask what is necessary in Canada in terms of a workable federalism today, and what kind of constitutional change will not just deal with today's programmes or organization but the kind of things

that are going to take place in the next two decades or longer.

The question I asked myself is: is that latter approach politically possible or realistic, or does one have to approach this exercise with a minimum of what is possible rather than the maximum scope of what would be desirable? We have been through this question before, and I think, Ted, what you are really saying is that in a way it is too bad that one begins with the conclusion rather than ending with the conclusion. They are saying rather: "Here is really all we can do or what we should do"; and if I understand your point, it is that we should be trying to get beyond that a bit and be a little more objective.

PROFESSOR McWHINNEY: I was talking to John Conway about this earlier, but I am convinced that in 1967, even early 1968, you could have got some sort of constitutional novation, one could have had a bright, new, shining constitution. There was a certain mood of euphoria about, even in Quebec, and I think the opportunities were missed.

We now have really jelled on two problems. One is the response to Quebec and Bertrand is being pragmatic over a lot of the old symbolic issues; this part is played down a bit and we are really just modernizing piecemeal particular sections of the constitution. But the concept I have of the fundamental novation, development of a constitution

for the last third of the century, which really is independent of the Quebec problem that might have provided a solution within itself -- this has sort of disappeared from Mr. Trudeau's thinking.

Maybe the provinces should start pressing it forward themselves. There is a deplorable lack of general philosophy in these federal proposals, other than federal supremacy which keeps being reiterated.

THE CHAIRMAN: This is it. There is lack of philosophy and very firm policy, and I am wondering if that is the reality perhaps. Perhaps we should put this question to the Attorney General on the reality of the political world. Are we being foolish to even contemplate a more philosophical examination? I have been worried about this from the beginning in this exercise.

THE HON. MR. WISHART: I think the exercise is well worth while, and I think we have to go through it. I think you have eventually to get down to some pretty firm positions and say that this is the way we go or the way we think we have to go if we are to live together in a federal country. I think the philosophical study has much to commend it; I mean, it is a good exercise.

PROFESSOR McWHINNEY: Mr. Robarts established this mood, you know, at the Confederation of Tomorrow, that there is a rather positive approach to constitutional change. It was a very exciting

concept, and the federal proposals coming back, in my view, are very dull things. As you say, the centralized policy underneath is not the best method of combating it. As I say, it is dull and it has got this supremacist polity but there is no fundamental thinking underneath, and you really do want cooperative federalism; but you do not want to learn, if you are building an airport, you don't want to read the decision in the paper and it is a sort of *ipse dixit* decision with no economic studies, no noise studies and nothing of that sort.

There has been no cooperative federalism for the last two years. Is not the strongest method of attack at this point, that Paul was pointing to, to argue: "Here is a policy underneath, but we want to discuss what your general principles are, and if it is just federal supremacy that is not much of a system of federalism."

PROFESSOR BRADY: I think, Mr. Chairman, before trying to form a general philosophy your primary task is to be governed by what you find to be the realities of the present. I do not know that you can get a philosophy for twenty years from now. I think with what seems to be in view of the forces and the nature of Canada today, the interests in it and so on, you try to arrive at what seems to be that which will contribute best to the working of this union, federation or whatever you like to call it; and that involves inevitably, of course, the

consideration of the interests of the provinces and their position as agencies of the centralizing in a large state where you have provinces or communities with somewhat different interests and trying to live, economically, politically, under slightly different circumstances. I think it is this kind of facts, diversities, as well as a sense of unity on some things, that will determine the kind of philosophy that is desirable.

I think what initiated this discussion is this emphasis in the federal paper on national interest and the peculiar interpretation of it. I think that should be challenged, on the early ground that I think Don Stevenson mentioned and others mentioned earlier, that one government can hardly be capable of interpreting the full national interests of this country. One has only to think of the French-English cleavage to see how absurd it is to try and work upon that premise of one government interpreting one interest. I think that should be made explicit, probably in our submissions on behalf of Ontario. I do not like to generalise, but you can generalise to that extent and support that general thesis.

MR. STEVENSON: Mr. Chairman, one approach we might take, if you agree, is perhaps to have Gary, who is the main author, go from page 10 to page 13. It is purely three pages of the suggested Ontario paper, and it is in three sections. Perhaps if he were to

read a section at a time and at the end of each section have some comments as to what might be changed, added or whatever, or whether the concept is worth it.

THE CHAIRMAN: I was going to suggest that whereas we may not have done justice to the federal paper, I think we have certainly opened up the issue, and Professor Brady's comments were a nice entrée to what Ontario's position should be, and we have the draft paper that Don has referred to. However, everything in proportion: I think tea is ready and we might have a little break and then resume with Gary taking us through the draft paper we have prepared against this background, and see if we can nail it down a little bit.

---- Short recess.

THE CHAIRMAN: Can we resume, please?
Ready to take us through this paper, Gary?

MR. POSEN: I don't know whether you want me to read through this.

MR. STEVENSON: Yes, sure.

MR. POSEN: Page 10:

" The field of 'social security' is "not explicitly provided for in the "distribution of powers in the British "North America Act. In 1867 such "services were not considered the responsi- "sibilities of government to the same

"extent as today, and reliance was placed on private institutions and charities. The extent of government involvement was mainly at the local level, while higher levels were involved only under special and well-defined circumstances, for example section 91, quarantine and the establishment and maintenance of marine hospitals.

" It is therefore difficult to cite specific sections or heads of the present constitution in order to ascertain the existing distribution of powers in the social security field. However, it may be inferred that provincial jurisdiction over local matters and over property and civil rights included jurisdiction over social security. Judicial decisions in this field have tended to confirm this claim. The powers of the federal government, on the other hand, have been based on Parliament's general spending power and on specific constitutional amendments, e.g., unemployment insurance (which provides for exclusive federal jurisdiction) and public retirement insurance (which provides for concurrent jurisdiction with provincial paramountcy).

" Throughout the past half-century,
"Parliament has made extensive use of its
"spending power to make payments directly
"to individuals and to conclude a wide
"variety of conditional grant agreements
"with provincial governments. In this
"way, they have staked a major claim in this
"field of jurisdiction. This action has
"taken place in response to demands for
"income redistribution between richer and
"poorer individuals and between richer and
"poorer regions of the country. As Canada
"has grown more industrialized and urbanized,
"and as Canadians have become more mobile,
"demands have increased for the provision of
"a minimum standard of services across the
"country - demands that the Federal
"government has tried to meet in a variety
"of ways, including the introduction of
"social security programmes, via the
"spending power.

" During the same fifty year period,
"provincial governments have also
"introduced substantial social security
"measures, and are now providing a
"substantial range of services to their
"residents. In general, these programmes
"are provided on a personal basis as
"required by the individual, e.g.,

"counselling services, as contrasted to
"the federal programmes which are of an
"impersonal variety, e.g., family allowance.

" It is with this background in mind
"that discussions during the constitutional
"review might take place."

MR. STEVENSON: We might break there.

THE CHAIRMAN: Is there any dissent on this
general introduction? Does it seem a reasonable
balance?

MR. STEVENSON: In discussion with some
of the federal people who have been making a strong
case about the early history, one gets the impression
that in 1867 what we now know as welfare matters,
poor laws and so on, were very much local and private
in actual application of programmes, but that there
was very little in the way of government health
services during the nineteenth century at least.
The federal people at any rate were making the point
very strongly that government health services really
found their way into the fabric of Canadian society
through some of the specific federal responsibilities,
before you got any general provincial involvement
through public health.

I think they were making this argument to
try to support their general provision that the
Fathers of Confederation felt that health would be as
much federal as provincial, although I do not think
the supporting historical development of programmes

necessarily supports the general conclusion that health and welfare services were anything but provincial or local.

THE HON. MR. WISHART: Can you distinguish family allowances very clearly as being impersonal, another type of welfare service? I am not saying that there is a distinction, but you could almost base an argument, I think, that they might go from there to quite a field, if the federal people wished, taking that as a base; they could extend it a long way.

MR. STEVENSON: The way some people have made the distinction is that a programme involving nothing more than the writing of cheques, that is, actual administration, is an impersonal programme. However, there are a number of provincial programmes in this field too, and we could bring up premium assistance for Medicare, legal aid in a sense (its financial assistance aspect), the public housing income support; insofar as welfare payments, those that are not based on individual counsel.

THE HON. MR. WISHART: Definitely more personal, I think, because they are related to a particular situation, in the sense that this is much more general but still quite a bit personal. However, that is not a very important distinction.

PROFESSOR CONWAY: Of course, as far as the Fathers of Confederation were concerned, I think it was Ted McWhinney who wrote that the B.N.A. Act

is a typical bourgeois document written in the era of laissez faire. The Fathers of Confederation, I think it is quite correct to say, had no idea whatsoever of health and welfare responsibilities. That is a concept that comes sort of with the Fabians in Great Britain towards the end of the nineteenth century.

PROFESSOR McWHINNEY: Tory democracy, Disraeli, I think, begins ---

PROFESSOR CONWAY: Some public health, yes.

PROFESSOR McWHINNEY: The Fabians stole it.

THE HON. MR. WISHART: Assuming that is so, going from there if you come into a situation a hundred years later where these social services and assistance matters are of great importance, just the fact that they were not prominent or were not a need in 1867 is not an argument -- and I am being a devil's advocate -- that they should not perhaps be federal today, is it?

PROFESSOR McWHINNEY: Let us put it this way. The first part of your statement, Mr. Attorney General, as Chief Justice Warren said in the school segregation case: the mere fact that you did not consider education of Negroes a problem in the 1860's does not mean you do not accept it to constitute a problem today.

I would make the next point, that assuming you say it is a governmental responsibility

today, there is certainly no need to escalate to the conclusion that it has got to be a federal government.

THE HON. MR. WISHART: No, not at all, but I say it is no argument to say that it might not go to one government or another merely because it did not exist a hundred years ago.

PROFESSOR McWHINNEY: Right.

PROFESSOR CONWAY: I think it would be unwise for the federal government to argue that the Fathers of Confederation had any of these considerations in mind, because I just do not think they did.

PROFESSOR McWHINNEY: They clearly did not.

THE HON. MR. WISHART: They clearly did not.

PROFESSOR McWHINNEY: As Warren said in school segregation thing, that if you solve it today you solve it on the basis of modern principles, and you would say cooperative federalism, which means very basic provincial responsibility here.

MR. STEVENSON: Mr. Chairman, I would be tempted perhaps to put in at the top of page 11 a sentence just describing four or five of the most recent programmes in this field that provinces like Ontario have initiated, because the federal government says nothing about provincial programmes other than two or three of the very broad welfare services that people all know about.

I think perhaps the most interesting thing

about this whole field and government intervention in it in the last four or five years, has been the introduction of a whole series of programmes along the line of Legal Aid, that are partly social security and perhaps partly something else. These in themselves, by forcing somebody to think: "Where would they fit inside the federal definitions?" immediately open up an entirely new field.

PROFESSOR LEDERMAN: I believe, Mr. Chairman, the way the provincial government found itself assuming responsibility for these things was that we started out with private insurance and private insurers making private contracts, civil rights within the province; and the health insurance question, when it goes public you have to put the private insurers out of business. So it was natural that there was a jurisdiction over the private insurance business by provincial, so when you terminated private insurance and substituted public insurance the insurance principle went public, and jurisdictionally the idea was it was still provincial.

PROFESSOR McWHINNEY: Because it remains insurance, in terms of characterization, and still provincial. After all, the value of the neutrality of the Canadian constitutional system, the B.N.A. Act and the provincial ones, is such that the mere introduction, let us say, of a social-democratic norm in the place of the bourgeois norm does not

change the constitutional allocation of competence.

PROFESSOR LEDERMAN: It was just that fortuitous, accidental way that the provinces found themselves dealing with that new responsibility.

PROFESSOR McWHINNEY: But the accident followed the logic of the constitution.

PROFESSOR LEDERMAN: Yes.

MR. POSEN: "2. Future Considerations

" Consideration of the constitutional "aspects of social security is seriously "complicated by the wide-ranging debate "now taking place in many countries about "the direction in which future developments "in this field should go. This debate has "not been confined to academic or governmental "circles, but has now become a general "subject of discussion in the newspapers and "other communications media.

" Some Canadians maintain that we have "reached a point where the basic objectives "of social security measures have now been "largely attained, and that the task is not "now to introduce further large-scale "government programmes which they argue are "both unnecessary and undesirable, but to "consolidate and rationalize the existing "web of programmes to ensure that they meet "the objectives for which they were "originally intended. These Canadians are

"challenging the effectiveness of the
"present programmes, and some have even
"called into question the validity of the
"basic objectives. Schemes for providing
"a guaranteed minimum income or for a
"negative income tax are being proposed,
"although their advocates are divided over
"the extent to which such programmes should
"replace all or part of existing social
"security programmes.

" Others are coming forward with far
"more radical proposals envisaging a time
"when technological change will have
"revolutionized the relationships between
"work and leisure, and where the field now
"known as 'social security' will be only
"part of a larger field of public endeavour
"related to the full development of
"individuals. Such an endeavour would
"encompass much of what is now included
"within educational, cultural, recreational,
"economic and taxation programmes.

" With this wide variety of possibilities
"available to us in the future, proposals
"for constitutional change in this area
"must provide our federal system with
"sufficient flexibility to adapt to future
"needs. However, the proposed
"constitutional provisions cannot be so

"flexible as to provide no tests for
"determining which order of government should
"have the responsibility for initiating or
"carrying out a particular programme."

THE CHAIRMAN: Comments? This really is the point I think we were dealing with earlier, that much of our thinking here has been determined by the character of programmes we have built up into a rather full social security system, and perhaps the kind of approach we are going to take to these problems in the future will be very much different.

MR. STEVENSON: It is difficult to tie in a section like that to conclusions.

THE CHAIRMAN: This is it. We have had the background; now we have the foreground, as it were. I do not think it is substantive. We feel it belongs, however.

PROFESSOR CONWAY: I think it shows an excellent awareness in that third paragraph.

THE CHAIRMAN: That is the key one.

PROFESSOR CONWAY: Yes, and that is very important.

MR. GREATHEDE: One of the things, Mr. Chairman, is in this paper, is that we have made no attempt to distinguish, as the federal government has made a very serious attempt to distinguish, between income security and social security; thinking, I think, initially that the distinction is a wee bit on the artificial side. However, we could conceivably

get into problems if we just used, as we have entitled this very preliminary draft, the all-embracing term, "social security", but we very deliberately avoided trying to make the distinction which Ottawa did. I do not know if members think there are some difficulties there that we ought to be aware of. I would appreciate comment on that.

THE CHAIRMAN: There are two approaches to it. Personally, I would sooner make the definitions fit the objectives. I find the definitions a little specious, myself, but I do not know how others would react to them.

PROFESSOR BRADY: Would it be worth while to make explicit as Ed just mentioned?

THE CHAIRMAN: The reasons we have troubled over this? Perhaps we should. I think we should not just pretend that we ignore them. If we have reason for being worried about them, we should state it.

PROFESSOR McWHINNEY: There is no justification for starting with definitions. If the definitions corresponded or were synonymous with the constitutional allocation of power, one could understand it; but you start with the static definitional approach which obscures or controls your definition of the problem and the agreed solutions, and gives you no particular help with the decision on allocation of constitutional responsibility.

MR. GREATHEDE: This is related too to the

other point, that the paper was drafted as deliberately as possible, it was agreed on internally that it should not be a formal reaction to the federal paper but rather an attempt to come up with a position that was our own and that did not sort of nit-pick at each of the federal proposals. We did not have time to nit-pick at all those federal proposals, but the other thing was that psychologically and tactically it was thought to be more advisable to try to make a presentation on your own grounds rather than on someone else's.

PROFESSOR McWHINNEY: Static a priori definitional approaches that, in my view, determine or tend to pre-determine solutions are no particular rational basis. You start with a problem and proceed to the solution of the problem, and only when you come to the issue of constitutional allocation, it seems to me, you need to conceptualize in these definitions.

PROFESSOR McIVOR: I agree with that general observation, Ted; but without necessarily supporting the sub-divisions and definitions that the federal paper provides under the broad heading of social security, is it reasonable to suppose that we would have some tentative notion of the overall ambit, if you like, of the expression "government social security measures"? Do we have any clear idea in our own minds as to what portion of government policies fall within the notion of social security

measures and what do not?

PROFESSOR McWHINNEY: You can only do that, Craig, in my view, empirically. The difference between the a priori and a posteriori method starts with what the Ontario government is doing. Collect the programmes together and then you have got a statement: "Well, this is our conception of the field of social responsibility of our government".

PROFESSOR McIVOR: I think there are some risks in going ahead on the assumption that we all have some general idea of what social security measures mean.

PROFESSOR McWHINNEY: We do not, except perhaps as a minimum, because it will differ according to your philosophy of government; it will differ also in terms of your instrumental choice of achieving social objectives.

PROFESSOR McIVOR: The example was raised here a few minutes ago of the legal aid programme. It is a little difficult to fit that into the federal government's elaboration of social security measures, and if we do and agree it should be, then it seems to ---

PROFESSOR McWHINNEY: It is a brilliant example, because it really makes everybody think. I have never considered legal aid as social services, but maybe I am wrong in this.

THE HON. MR. WISHART: I was going to say, why should not the federal government (just again to

be an advocate of the devil) say that they have the criminal law and criminal procedure, and they are talking about bringing in a system of legal aid; why should not the federal government take the position all across this country: "This is one of the items of social security which we should be doing for all the people. You saw fit to do it in Ontario, and you were able to do it to a degree, but we think it should be one of those federal jurisdictions, one of those federal responsibilities. Why should we not do it?" What is the argument against that?

PROFESSOR McWHINNEY: It pre-supposes a uniformity of response and a quality of treatment throughout the country. I suspect that the position here would be that legal aid in Ontario is generically different because of the superior development of the province, from what it is in Prince Edward Island, and the rational thing is to allow local determination of the ambit and scope and range, even whether there is such a system. The federal role, if any, should be, while it maintains this substantial preponderance of financial power, the facilitating through financial aid of such programmes.

I would be very happy to make a case -- and certainly Quebec, I am sure would -- that legal aid is intimately related to the ethnic culture component of your community, and what is good in Ontario is not necessarily good in another province.

THE HON. MR. WISHART: Someone might argue

it might be a very good idea to get rid of it from the financial burden..

THE CHAIRMAN: You mean someone like the Treasurer. (Laughter)

MR. STEVENSON: I would take it from reading the federal paper, that they would exclude legal aid from their definition of social security.

THE HON. MR. WISHART: Yes, they would.

MR. STEVENSON: Because they say that any programmes that may seem on the face of it to be social security problems and yet are by-products of a programme in another area, are not to be considered in this programme. Their intent, of course, is to carve an area of economic programmes that I think a lot of us might consider social security.

PROFESSOR McWHINNEY: Except that legal aid now with the community acceptance takes on large financial aspects, and it may well be the Attorneys-General of the larger industrialized provinces may wish to make a strong case for and contribution to the cost of these programmes.

THE HON. MR. WISHART: I would not want my remarks to be so construed at the moment.

PROFESSOR McWHINNEY: You would not object to finance, Mr. Attorney General?

PROFESSOR SYMONS: Mr. Chairman, I think the discussion indicates this is an enormously useful section of the presentation. I think it highlights how completely this kind of speculative leaven and

anticipation is missing from the federal presentation. It is an extraordinarily significant omission, not only from their presentation but, as far as one can sense, from their thinking. If anything, I would hope that this aspect of our province's presentation could be expanded a little bit.

THE CHAIRMAN: Yes.

MR. GREATHED: There is another aspect of this, and the reason why I really raised the definitional problem is that, of course, the prime ministers will be talking about this on television, and this has been one of my concerns, at the earlier part of this paper, at the beginning, that if there was any way -- and a few suggestions from the Committee would be very helpful in this regard -- that the presentation notes that Mr. Robarts uses or the way he presents it, could be made as crystal clear as possible, a lot of people who will be wrestling in a much more difficult way than we are wrestling here now with just a fairly simple term like social security, I suspect that if there are not some fairly clear definitions at the beginning you are going to have eleven views around that table as to what are social security, what are income support measures, etc., and the result will be a rather unclear discussion. I do not think you can structure a discussion like that completely, but I think for this particular purpose and for our own government's, it is extremely important to get across on the medium of television

that this is what we do mean by the term, and this is really why we resorted to the perhaps somewhat more simplistic title for this paper than the federal government used for theirs.

PROFESSOR MEISEL: I was wondering whether it was really wise to ignore the federal definition as thoroughly as seems to be the case here. I see the advantage of not appearing to be quibbling about terms and really responding to the federal view, and not nit-picking. On the other hand, I think there is something very compelling about the neatness of the federal definition and, of course, it is very well designed to lead to the conclusions which they are reaching. This will not be a very loud and persuasive argument if somewhere along the line it should really be shown to be specious. If you think it is specious, I think you have to say so somewhere.

MR. STEVENSON: I would think if you do get into definitions at all, it should be right at the very end of the paper, not at the beginning.

PROFESSOR McWHINNEY: Or if it is at the beginning, it should be an empirically based definition, definition in terms of logical extensity starting with Ontario's programme of social security (using Gary's term) and that this is what Ontario has done; the social policy objectives that are concretized in specific governmental programmes which have been in operation for so many years. It is a nice opening statement for the Premier. He can

highlight Ontario -- the land of opportunity, social security combined with the opportunity; but that is the way to do it, instead of this abstract a priori definition.

THE HON. MR. WISHART: I agree with that.

THE CHAIRMAN: Have the Queen's Park choir singing "A Place to Stand" in the background.
(Laughter)

PROFESSOR McWHINNEY: As long as they are pretty.

THE CHAIRMAN: It is too bad to think in these terms, but the fact remains that this discussion will take place in the public view, and the Government of Canada presumably will introduce this discussion with the presentation of the paper and definitions on which they are basing their thinking. I think it would be very important for Mr. Robarts, in his comments in the beginning of the conference, as you say, to explain the kind of qualitative development that has taken place in this province over the years, and from that to lead to the conclusion and to the appeal for an open, objective inquiry into the kind of society we are coming into and the kind of constitution we need to service, which I think probably suits his thinking very well on this, which is the functional federalism approach -- what are we trying to do here to make Canada a place in which this system will work?

THE HON. MR. WISHART: You might go right on perhaps to say that we have all these functions and responsibilities which we are doing; we need the resources of Parliament to carry them out.

MR. DICK: Back to the money. Mr. Chairman, may I just express my concurrence with what Professor Brady and Tom have said. To my mind, the most significant sentence in what I have seen so far is the first sentence in the third paragraph. This is the type of thing that to my mind should be moved forward closer to the forefront of any comments that the Prime Minister makes, and enlarge upon it, and from that point perhaps to distinguish our view from that of the definition approach. As I say, the germ of that is the ultimate answer, I think, to the federal position. I think perhaps ranking in this context lower down and so on is not doing it the justice it deserves.

PROFESSOR McWHINNEY: But you have to do that, Rendell, against the background of saying: "For so many years this is where we began, this is what we have done, concretely 1, 2, 3" and list the applications and the range. This sentence becomes meaningful against that background, it seems to me, and politically highly attractive, too.

MR. DICK: Perhaps I would open with my best hand, that is the difference. You would be holding back.

PROFESSOR FOX: I wonder, Mr. Chairman,

if this would not be the place to bring in some reference to federalism, as we mentioned some time ago. In other words, I think it would be appropriate and of some public interest, if you were watching television, to have Mr. Robarts explain what his concept of federalism is, to emphasise the role of the province. You can then lead very naturally from that to what Ontario has done.

THE CHAIRMAN: Yes, that would be a start.

PROFESSOR FOX: I think there is a need for that, because the equation you mentioned earlier is held by most people, I think, in public discussion. I think they assume that federalism means a strong central government. They are talking about centralism, not federalism. I think it would be very appropriate to make that clear.

MR. GREATHEDE: You don't think this is the view held by the majority of Canadians?

PROFESSOR FOX: I would not like to generalise; I do not know. I know that it is surprising in Toronto, which is the provincial capital, that most of the people you encounter in provincial service are centralists.

MR. CALLAGHAN: We were all brought up on R. McGregor Dawson.

PROFESSOR FOX: No, it is really because they regard Ottawa as a suburb of Toronto.

PROFESSOR CONWAY: This is it, but it is

not true as you go west.

PROFESSOR FOX: No, but I am serious about this. I think there is a very definite need for a contrary definition of federalism. I think it is terribly important at this stage in the national discussion, because if you do not make the point it goes by default to the federalists who are talking in centralist terms.

MR. STEVENSON: What the federal people have continued trying to do is to isolate Quebec on a different definition of federalism. We have brought up many times in the civil service discussions the fact that we conceive a great difference between centralism and federalism, and that in essence our view of federalism is very close to that of Quebec's, as a generic term; but time and time again we get back from the federal position: "Oh, you may be speaking in a hypothetical, academic sense, but does your government and the people of Ontario really subscribe to that?"

MR. POSEN: For one step further, even if they do, they then turn to the small provinces and say: "Do you want Ontario or Quebec to define the national interests for you? Wouldn't you rather have the federal government do it where at least you are at liberty --- "

PROFESSOR LEDERMAN: Is not the type of federalism that one wants to advocate the so-called partnership in federalism?

PROFESSOR McWHINNEY: It is cooperative federalism really.

PROFESSOR LEDERMAN: But the concept of partnership has a certain quality of cooperation of its own.

MR. GREATHED: What Mr. Robarts called participatory federalism, as you may recall.

PROFESSOR McWHINNEY: And add that newest term -- the supermarket of ideas -- participatory federalism and the supermarket of ideas, that is brilliant.

PROFESSOR BRADY: Mr. Chairman, don't introduce any more difficulties. (laughter) I think we have enough.

THE CHAIRMAN: You have destroyed me, because I was going to say we have to start to work against avuncular federalism.

PROFESSOR BRADY: I do not think you can overdo explaining federalism, because I do not think that is understood by ordinary people; I think you cannot be excessive in explanations of what it means -- explanations, of course, very concretely expressed. I think it would be very fitting that that should come into the Ontario statement somewhere.

MR. STEVENSON: In a sense, it is the next section that really gets into this.

THE CHAIRMAN: If you will forgive me, I think we should move along.

PROFESSOR MEISEL: I wanted to say earlier,

in response to something that Alec Brady said, which I think is really relevant here: it seems to me that one other thing that Mr. Robarts ought to say (and I think this is probably the best place) is to come to grips with the argument that Professor Brady attacked, namely that the federal government is the most appropriate body which can define the genuinely national interest. I think it is very convincing to a lot of people to hear that there in Ottawa are the representatives of all the regions, they are elected, and why should they not be the people who define those things which are common to all of us?

I think that a person who has been responsible for government in a province can argue in very concrete terms why you develop a different perspective if you have to carry out certain things within the provincial framework that give you a different idea of what is the province's interest from the federal M.P.'s point of view. I think something of this kind could very well be mentioned by Mr. Robarts here.

THE CHAIRMAN: Very good. Shall we go on? Page 12.

MR. POSEN: "The Government of Ontario
"is in basic agreement with the present
"distribution of powers in which juris-
"diction over social security is exercised
"by both orders of government -- the
"provincial governments acting under a

"variety of general constitutional
"responsibilities and the Federal
"government under its general spending
"power. Ontario's disagreement with the
"Federal government has not been over
"jurisdiction, but over how the
"constitutionally unlimited federal
"spending power has been used, both in terms
"of payments to individuals and in terms
"of shared-cost programmes with the
"provinces.

" The views of the Government of
"Ontario in this regard have been expressed
"in an earlier paper, 'The Ontario Position
"on the Spending Power'. In this paper,
"Ontario argued that the federal power to
"spend on shared-cost programmes in areas
"of provincial jurisdiction should be
"limited to instances when a national
"consensus has determined that the power
"should be exercised. The federal paper,
"'Federal-Provincial Grants and the Spending
"Power of Parliament', basically accepted
"this view. With regard to the federal
"spending power and payments to individuals,
"the Ontario paper further cautioned that
"the right to make such payments should not
"be used to distort or circumvent the
"distribution of powers or provincial

"and programme priorities.

" Ontario's disagreement with the
"Federal government in the field of social
"security also has its source in the
"general failure of tax revenues to meet
"expenditure responsibilities, and more
"specifically in the unwillingness to date
"of the Federal government to accept this
"principle and permit the provinces more
"room in the high growth tax fields without
"significantly raising the total tax burden
"on Canadians. If tax-sharing is not
"strictly a subject of constitutional
"discussion, it is indisputably one that
"underlies most of the current difficulties
"and Ontario objections in many areas of
"the distribution of powers, and that have
"made for much of the present tensions in
"our federation. If federal programmes
"introduced under the spending power continue
"to grow more numerous and more expensive,
"thereby placing increasingly unacceptable
"financial burdens on the provinces and
"the people they represent, the tax
"revenues that will be left available to
"provincial governments will make a mockery
"of the distribution of powers. If
"federal spending in this area is not now
"firmly controlled, provincial jurisdiction

"will soon be eroded de facto or, in the
"case of shared-cost programmes, provincial
"attempts to finance their shares of these
"programmes will necessitate shifting
"financial resources from other areas to the
"detriment of provincially-set priorities.

" As far as Ontario is concerned,
"therefore, the major requirement is to
"reach an agreement as to the ground rules
"that will govern the use of the federal
"spending power, and the principles that
"will govern the sharing of joint tax fields.

I will finish off.

THE CHAIRMAN: I think you might as well.

MR. POSEN: "In a revised constitution,
"the Government of Ontario would recommend
"that:

- "a) the inclusion of a specific head,
" social security, in the written
" constitution, and under the exclusive
" jurisdiction of the provincial
" governments. This head would make
" specific the jurisdiction that the
" provinces now exercise under other
" related but general heads;
- "b) the continuation of federal jurisdiction as exercised through the spending power, on the condition that agreement can be reached on limiting the use of

" the spending power to initiate shared-cost programmes in areas of exclusive provincial jurisdiction;

"c) the continuation of exclusive federal jurisdiction over unemployment insurance;

"d) the continuation of concurrent jurisdiction, with provincial paramountcy, over public retirement insurance schemes."

MR. STEVENSON: When one is talking about spending power, I think one point we have been making in the last while is not just the federal power to spend on shared-cost programmes, but the federal power to initiate change or terminate shared-cost programmes; in that a great deal of our recent problems have been unilateral terminations or imposition of ceilings or other changes.

PROFESSOR BRADY: I know that inadequate discussion with the provinces beforehand, giving them a chance to think out what their problems were and how best the programmes could be adjusted to their problems, that has been a difficulty, has it not?

MR. GREATHED: Mr. Chairman, I would make one small suggestion on page 12 in the third paragraph beginning "Ontario's disagreement ...", the fourth line of which begins "... of the federal government to accept this principle ...". I would suggest that we say here "... to accept the principle that

revenues should match expenditure responsibilities".

It sounds as if we are putting the principle, being the general failure of tax revenues to meet expenditure responsibilities.

THE CHAIRMAN: That is right.

MR. GREATHEAD: It is a very small point.

MR. STEVENSON: I wonder if one might get a comment or so on the general proposition that there is a strong case, in programme terms at least, for the federal government being in the social security field to the extent that it supplies a basic minimum income floor either to all people or to particular groups of society; that the important thing then would be to ensure, in future programmes, that this minimum not be so high as effectively to pre-empt the possibilities of local and regional governments providing supplementary programmes that may reflect different levels of expectation in different regions -- reflect different needs in different parts of the country, reflect different social philosophies on the part of different regional governments, or a different set of preferences as between social security programmes and other types of programmes that may be directed towards somewhat the same need.

I have the feeling here that as long as we are content to leave a federal power of initiation through a concurrent power in the spending fields to individuals, then we must make sure that we put forward views on how we think this power should be

used.

One thing I would like to see, for instance, is that we ensure that we make the point that if the federal government cannot get agreement on a shared cost programme, it then does not turn around and initiate a programme of direct payments to individuals to meet exactly the same objectives and thereby getting around the need for getting any provincial consensus. I can see this happening very easily; in fact I am sure this is exactly what will happen if the federal government has a big idea and cannot get agreement from the provinces to introduce it.

PROFESSOR McIVOR: Are you suggesting that for all federal expenditures on social security programmes, the level be confined to something that is the minimum acceptable national standard?

MR. STEVENSON: Yes, but you cannot really write this into the constitution.

PROFESSOR McIVOR: No. This is the ---

MR. STEVENSON: The guideline for operation.

PROFESSOR McIVOR: Guideline for operation with the whole of the variations superimposed by provincial initiative.

MR. STEVENSON: Yes. Does that make sense to you?

PROFESSOR McIVOR: Yes, I think that basically it is a good approach.

MR. PERRY: What does "social security" mean here -- all the things we have looked at previously, income security, social services; it is the whole ball of wax, is it?

PROFESSOR McIVOR: I have a further question about that, Harvey. Gary, on your sub-section 4 there, your final section, you are saying that the Government of Ontario would recommend the inclusion of a specific head of social security in the constitution; then down in sub-section (d) you are singling out a recommendation about public retirement insurance schemes, which is different. Does that mean that you have, as of now, written out of your notion of social security, public retirement insurance schemes?

MR. POSEN: Only in the sense here, I guess, that we have taken unemployment insurance, public retirement insurance, and made them exceptions to the rule of exclusive provincial jurisdiction.

MR. PERRY: But your definition is broad enough to include these, because you feel it necessary to exclude them.

PROFESSOR McIVOR: Is (d) then really an exception to (a) and, if so, could it not be more clearly indicated as such?

MR. PERRY: So this is almost the broadest terms that one could conceive of in social security.

MR. DICK: This is a Machievellian move. This is the way I read it, and this is the impression I think anyone would get, and this is the impression I think anyone else would get, that we say everything, the whole ball of wax (as Harvey calls it) is a provincial jurisdiction with two exceptions; and then any exercise by the federal government is going to have to be done through the spending power with the national consensus. Is that what we are suggesting here? Is that what we are accepting?

MR. PERRY: That is the question before the House.

MR. DICK: It is rather a sweeping proposition, is it not?

MR. PERRY: It follows from the statement here that Ontario's main concern is to contain the federal spending power.

PROFESSOR McWHINNEY: (b) is the opposite situation, is it not?

PROFESSOR LEDERMAN: It is not really necessary for (a) to contain the federal spending power; (b) does it.

PROFESSOR McWHINNEY: The provincial view would be that (a) simply re-states the present constitutional situation in a more convenient, shorthand form; but once you concede (b), continuation of federal jurisdiction over, what, over social security, is that the implication?

MR. STEVENSON: The thing with (b) is that the major federal programmes in this area now are not through using the spending power in shared-cost programmes, but by using the spending power for direct payment to individuals -- old age security and family allowance being the two main ones.

PROFESSOR McWHINNEY: Yes, they are illegal glosses, if you speak in formal terms.

MR. STEVENSON: But there is no limitation on the spending power there suggested in the federal paper, and you are not suggesting any, Gary?

MR. POSEN: Not here. I think we discuss it briefly.

PROFESSOR McWHINNEY: To be honest, they are illegal glosses on the constitution, in the way it is formally written, which have been used by making the spending power a grab-all device for exercising jurisdiction over things that were not federal. Why do you have to concede it in terms? It exists, of course, but why concede it? You are anxious to cut it down, are you not? In other words, why do you have to have (b) in at all?

PROFESSOR McIVOR: One of the things that still troubles me here, though, is that in (a) we introduce a category of social security. In (d) it seems to me we have excluded something from that broad concept. Then the question arises: what else have we excluded or what else have we included in the term? It just seems to be very vague, and I am sure

someone will raise this kind of question.

MR. POSEN: Normal definition again.

PROFESSOR McIVOR: You are implying some kind of definition when you exclude such and such in category (d) there.

MR. POSEN: Essentially we are coming to the same conclusion as the federal government did, because unemployment insurance and public retirement insurance are already separate heads and it works, so let us leave them as separate heads.

PROFESSOR FOX: Perhaps the point could be made by saying there are two exceptions to this rule, and then that covers your objection, Craig.

PROFESSOR McIVOR: Yes.

PROFESSOR LEDERMAN: If (a) is simply a re-statement, why bother?

PROFESSOR McWHINNEY: And (b) too, to be honest, you can say, simply reflecting law in action. Why do you bother, why legitimate something which in fact is a gloss on the constitutional text as written, and in some ways a sort of Frankenstein monster. You know, if you use the spending power, you can use it to reach any objective you like.

MR. DICK: Is not the condition that does not exist in our constitutional fabric at the moment, why we must mention the spending power explicitly: that we recognise the use of the spending power, but only subject to the addition of a national consensus where it intervenes in an Ontario provincial

jurisdiction.

PROFESSOR McWHINNEY: What do you have in mind there?

MR. STEVENSON: Payments to governments or payments to individuals, or both?

MR. DICK: I don't know where that came into what I was thinking of at the moment, Don. What I was thinking of was the Medicare type of situation where by the exercise of the federal spending power in a direct payment hypothetically they could intrude into the field.

What we are saying in (b) in fact is that in future they will not be able, by using the spending power, to intrude in that manner unless they first establish a national consensus.

PROFESSOR McWHINNEY: But you did not quite say that in (b). In (b) you concede something at the moment is an assertion of federal power, with no particular constitutional basis for it. You limit the user of this, but you make the limitation subject to a condition then still to be attained, and it is expressed in rather vague terms.

MR. DICK: I read into those last couple of lines, I guess, a lot more because of previous discussion.

PROFESSOR McWHINNEY: Why not make it explicit then?

MR. DICK: I am all for it.

PROFESSOR McWHINNEY: Are you happy with

the consensus you have reached in these previous discussions?

MR. DICK: No, I wouldn't say that, but they are an inherent part of what has been a real issue on the discussion of the spending power.

PROFESSOR McWHINNEY: The spending power is clearly a very improper use by the federal government of power for one purpose to achieve other objectives, but it is a fact of life, and one wonders why you have to sanctify it and legitimate it.

MR. POSEN: My only question there is that without having (b) in there the Ontario government is set on a course for complete jurisdiction over social security with no definition of it, which would imply the whole range of programmes. Is that a realistic approach?

PROFESSOR McWHINNEY: You are not asserting your definition as comprehensive, though, in (a), (c) and (d), are you? In any case, if you do want something in (b) you could perhaps reach it by some such phrase as "such other areas where, by agreement between the federal and provincial governments, federal jurisdiction may be exercised", something of that sort -- if you want to have something of that sort in, leaving an escape clause for areas you want the federal government to exercise in.

You see, spending power can cover really everything if you want to. Once the foot was in the

door, this could lead anywhere. It is a sort of Frankenstein type of power, keeps on growing.

PROFESSOR LEDERMAN: I would question that to some extent. Donald Smiley in his work on conditional grants, which I think is several years old now but is still probably the outstanding thing on it, points out that fields like labour relations, of course, were not primarily involved in the payment of money; you cannot buy your way in. There are a lot of fields -- criminal law, you cannot buy your way in; but where you are dealing with a programme, where it is income support of some kind, then of course the power to use money and put conditions on the use of it becomes a way of influencing the provincial field. However, I think it goes too far to say that you can buy your way anywhere, because there are lots of things that do not depend on money but on sheer regulation. The only people you are paying are the judges, the police and the members of the Labour Relations Board.

PROFESSOR McWHINNEY: But the general notion, you would agree, is this, that you get into social service by using the spending power and you say the spending power is not subject to the limitations established in 91 and 92; but because you have got the power to spend, it is an independent head of power and you can attain objectives which otherwise you cannot within the 91-92 division.

PROFESSOR LEDERMAN: I think we had better

ask ourselves if there is some respect in which the province would like to be assured that it has an unrestricted spending power. Does the province want to be confined in spending money to legislative subjects in 92?

PROFESSOR McWHINNEY: That the province would be unhappy at being so confined, would be the best way to put it first, and then escalate your question, Bill, which is the more imperialistic one.

PROFESSOR LEDERMAN: You know, the power to lay out your money for what purposes you choose is a valuable element of flexibility.

PROFESSOR McWHINNEY: I would have thought the provincial answer would be "yes"; I may be wrong, in this, but in the modest way I framed the question, I think the answer would be yes, that the province is quite happy to have spending power limited to section 92 powers, including this new definition of social security.

MR. DICK: Limited to 92 powers.

PROFESSOR McWHINNEY: Limited to provincial powers otherwise conferred under the B.N.A. Act.

PROFESSOR FOX: Would not cover legal aid in criminal cases, would it?

PROFESSOR McWHINNEY: I think it would.

MR. DICK: This is a very difficult area, because the federal spending power inherently having residual power, is quite different to the spending

power which the province now has by virtue of being able to tax in a specific area for provincial purposes which are now defined on a specific basis under integrated heads.

Now, conceivably, if we maintain the same structuring in the constitution, we would then be limiting ourselves or inviting further constitutional difficulties if we expressly mention the spending power expressly reserved.

PROFESSOR LEDERMAN: My only caution here is: let us be careful we are not using a double-edge sword.

MR. DICK: In my own approach to our constitution, Parliament has the residual powers.

PROFESSOR McWHINNEY: Why link it to spending?

MR. DICK: Just because then, when the provinces have the enumerated heads, the only area in which you can find spending power, in my view, is by going to our right to raise revenue by way of direct taxation for provincial purposes, and enumerated as to where it is limited as to where we can use our spending power, which is tied in with your ability to raise revenue.

MR. CALLAGHAN: I think in social security you have to have a reference to what you include.

PROFESSOR McWHINNEY: Would you be happy with the statement of (a), Frank?

MR. CALLAGHAN: Yes, but I think I would like a little more definition of what is in that category.

PROFESSOR McWHINNEY: A listing of examples?

MR. CALLAGHAN: Yes, what you consider should be in there.

PROFESSOR McWHINNEY: "The inclusion of a specific head, social security, which shall include among other things ----"

and the listing that Prime Minister Robarts has already made.

THE CHAIRMAN: I have a slight feeling that following from the reasoning early in the paper, maybe we are trying to do two things in the one place: that is, on the one hand talk about federal spending power and, on the other hand, to talk about federal capacity to spend. The spending power is the constitutional capacity, but we have also said -- and this is based on the fact that we know, for example, that the tax reform White Paper will give the federal government great reserves of taxing capacity in the income tax, while the provinces will not grow, and this will give them a great capacity to spend and to innovate programmes and so on, which is a thing perhaps we would like to contain in order to meet the point you raised earlier, Ed -- the capacity to have revenues distributed to match expenditure responsibilities.

So I think we have to be a little bit

careful that we are not sort of treading two tracks at once, and planning them in a way that is not coming out as specifically ---

PROFESSOR McWHINNEY: I think the figure I was searching for, by the way, was not Frankenstein by Proteus -- the protean power.

THE CHAIRMAN: Procrustean is maybe a little bit ---

PROFESSOR McWHINNEY: Procrustean would be the other way. We are arguing for a Procrustean federal spending power, are we not; but the notion which you get in several federal systems that because you have the superior tax revenue power and you can spend, that you can reach policy objectives not otherwise within your power under the constitutional division of power.

It seemed to me this is a notion you have to attack from the provincial viewpoint, and it seemed to me essentially the big provinces have attacked this. The federal government's shame-faced rejoinder has always been: "Oh, we acted there because there was a vacuum and somebody had to, and it was for the general good"; but it is not a satisfactory argument if you are proceeding from the viewpoint of a province. You really have to argue that the spending power is conditioned by the constitutional allocation of substantive heads of power. You would deny that it is an independent, free-wheeling source of policy-making that can override the constitutional divisions

of power. I think this point has to be basic to the provincial case.

Whether you want (b) in at all --- my feeling would be to strike it. Rendell's approach, which is a quite sophisticated one (I am not criticizing it on that account) is to put it in but with restrictions; but I would feel it is better to strike it.

PROFESSOR McIVOR: I was going to ask, assuming we get an appropriate allocation of spending powers in some constitutional revision here, what is your objection to leaving (b) that would read simply: "The continuation of the present federal spending power on the condition that ... "

PROFESSOR McWHINNEY: I think it is being used to reach matters that are not properly federal. I would say everybody has got a spending power that covers matters within a fair constitutional allocation of powers. I think that really has to be the provincial position.

PROFESSOR McIVOR: Assuming you get an appropriate allocation of powers as between federal and provincial levels.

PROFESSOR McWHINNEY: The spending power is always the reserve. You have got the money and the function, and if you can spend money the function can be gathered to the spending even though the function otherwise without the money would be within provincial power. That is the sort of thing that I

call the protean formula that I object to.

Frank, I gathered, agreed with me on this. Rendell's view was, because it is infact the illegal gloss on the constitution law in action, maybe you have to recognize the fact but cut it down by the conditions that you specify. My objection was that I did not like to feel these conditions as expressed here were sufficiently precise to cut down this protean federal power. You said that previous discussion had established limits, and I thought you were about ready to bring a formula forward.

MR. DICK: Not quite. There is one thing, Mr. Chairman, and perhaps this is due to my regrettable and (I hope) excused absence from the earlier part of the meeting: is it not the thought that this is a paper which, for instance, the Prime Minister might be able to read from as an item came up on the agenda?

THE CHAIRMAN: Yes.

MR. DICK: If that is the case and he reads this as a position with respect to the federal paper, to my mind to mention (a) and (c) and (d) sounds to the layman watching him over the "booby tube" that we have just forgotten about federal participation in any way in the field of social services and social security.

PROFESSOR McIVOR: That is right.

MR. DICK: I agree, to people who understand the problem and have discussed it and

pursued it, they would recognise the point, but I think the average person is going to miss completely that there is a federal spending power which is unmentioned but which provides federal participation in these fields.

So I think, in some way, just to get our message across, we have to recognise it, and I feel that while recognising it is fine, I personally do not want to recognise it in its present unlimited sense, in view of our discussion on the spending power elsewhere, and that is why I come back to suggesting it with the restrictions either modified or enlarged or otherwise dealt with there.

This brings me to one other point before I forget it, and I was going to mention it for the same reason of public consumption perhaps: in the third paragraph of page 12 where we speak of the tax burden on Canadians, to my mind one of the fundamental thoughts that Mr. Robarts has been expressing is that there is one taxpayer in this country and he cannot bear any higher rate of taxation from any form of government. Should we be clarifying that to some extent in that paragraph, so that it is put in language, again, that is readily and clearly understood by the Canadians who may be watching it.

Our approach towards this part of the constitutional responsibility is premised on the fact that you cannot go back and tax for provincial programmes if the man is already paying as much tax

as he can afford to pay. Therefore we must look at the distribution of those powers and responsibilities in that light. I think that point in 3 should be enlarged a little.

PROFESSOR LEDERMAN: Perhaps we might add to this, Mr. Chairman, that one taxpayer has two votes.

PROFESSOR McWHINNEY: Three votes if you count the municipality.

MR. DICK: We must not forget that today of all days.

THE CHAIRMAN: The one pocket and three votes theory. Our time is running on here. What we really wanted to do in this exercise this afternoon was to get your views in order to put them before the Prime Minister with a view to settling an Ontario position here. I wonder if we have gone into enough of the arguments around this question to take it forward, and we may get into this again tonight too.

MR. GREATHEDE: I think we have enough of the provincial argument based on the discussion of the federal paper, and the initial part of what Ontario might say. I think the difficulty, of course, is what kind of conclusions we reach from all this argument. I am not so sure we are going to have time this evening ----

THE CHAIRMAN: No.

MR. GREATHEDE: -- to go into that in any detail, but I think if the Prime Minister could be

apprised of the general argument that has taken place it might help his own thinking in terms of what kind of conclusions he thinks the government ought to reach on this whole question.

MR. STEVENSON: Mr. Chairman, if any members here have any marginal comments on either the federal paper when we went through it or this one as we have gone through it today -- or perhaps tomorrow or the next day, or if perhaps before they leave today if they have them and they could communicate them to Gary or Judy or somebody here, we can get as many as possible put together; because I think the discussion is going to be both a presentation of the Ontario position and at the same time a commentary on the federal paper.

PROFESSOR CONWAY: I would like to ask one question, Mr. Chairman, really more as a citizen than as a member of the Committee. Are we agreeing that social security (however defined) should be under the exclusive jurisdiction of the provincial government?

As I reflect on that, it has very important ramifications. It is a statement of principle in 4(a):

"the inclusion of a specific head,
"social security, in the written
"constitution and under the exclusive
"jurisdiction of the provincial
"government"

I myself, offhand, would be inclined to agree, but I think it is really saying more than it seems to, if you project it into the future in terms of ---

PROFESSOR McWHINNEY: You are arguing that social security, first of all, is surely exclusively provincial, as the constitution strikes me. Secondly, it seemed to me you are arguing this should continue. I was speaking on the spending power which was used as a device, perhaps because there was a vacuum, and perhaps simply because the federal government wanted power to get into the social security field; but the starting point surely is the factual constitution, the positive law that it is provincial.

PROFESSOR CONWAY: That is one of our problems, listening to this discussion: we are trying to force a very definitely modern concept of the 1950's and 1960's, that is, social security, into the language of a statute of 1867. I am not sure that this could be done and if we could accent this, because:

"All matters of a merely local or
"private nature in the province"
to a layman who is also a student of history, that 16 of Section 92 just does not consider social security at all.

PROFESSOR McWHINNEY: That is what Mr. Robarts has to do, though. What he is arguing is not that to argue it is provincial . is to create a policy vacuum; it is not the sort of negative

argument you got in the United States when you argued states' rights as a method of denying federal action and therefore any action. This sort of proposition, this normative proposition, has to be preceded by the historical demonstration that the Government of Ontario has had a social security programme of a highly specific nature developed over a long period of years and concretized in so many institutional terms. Then you go from there to your normative proposition, John, but only, I think, on that basis.

PROFESSOR CONWAY: You see, if you put it in the context of this paragraph on page 11, which we all agreed was so important, that first sentence, it seems to me in the long run you are really creating a new kind of federalism, because everything is going to come out of the provinces.

PROFESSOR LEDERMAN: On page 11 you are saying: "We do not know what the future holds". On page 13 you are saying: "Whatever it holds, we claim it is the province".

PROFESSOR McWHINNEY: Precisely.

THE CHAIRMAN: That is rather a telling observation.

MR. PERPY: And, I think, all in the confident knowledge that there is already a very large federal social security programme and that it is not going to be withdrawn very likely.

PROFESSOR McIVOR: I would have to

disagree entirely with subsection (a) in supporting what John Conway has said, unless the concept of social security is very clearly defined and some notable exceptions made to it -- as, indeed, subsection (d) indicates one major reservation. I think to just take it literally on the face of it, it is nonsense.

PROFESSOR McWHINNEY: Frank made the suggestion which I think is better, of defining your exclusions, if you say that this is really a provincial area but in fact the federal government has eased into it through the spending power: but the correct way of saying it is that it is provincial and to cite generic examples. You do not have to cite the negatives other than perhaps (c) and (d) if you want to concede that; but surely the way is, Mr. Robarts having recited that Ontario is doing these things, to indicate them as examples.

MR. CALLAGHAN: The words "social security" right now do not mean anything, the way it is written in there; it is too broad.

MR. PERRY: If you put yourself back into the 1930's, I do not think anybody in this room would be arguing for this in 1935.

PROFESSOR McIVOR: If we assume we do not know what "social security" means, I take it we will have no difficulty in agreeing with subsection (a). If we assume we do know what it means, I think there are substantial reservations to be made.

MR. STEVENSON: One thing that hits me about any tax system is that one of its basic characteristics in certain present-day times is its capacity to redistribute income, and the redistribution of income is right at the core of any kind of system of social security. I do not think for a minute that what is here would deny the right of a federally devised tax system to redistribute income.

I was thinking a little bit that perhaps if we want to define anything of the federal role in this, it might be geared upon this aspect of the social security area.

PROFESSOR McIVOR: If it is intended that that subsection (a) should leave substantial room on the part of the federal government for redistribution of income through fiscal mechanisms, then I think that should be much clearer. The implication is not there in the way the thing is written.

MR. STEVENSON: Perhaps one could put into (a) that this would include all aspects of the social security structure that involve direct contact with individuals. involve case work, counselling, this kind of thing, just to define it a little better.

PROFESSOR McWHINNEY: You mean federal redistribution?

MR. STEVENSON: Put that into (a) and into (b), where you are attempting to define a

limited federal jurisdiction, you perhaps gear it around the redistribution of income and perhaps the maintenance of some kind of income floor.

THE CHAIRMAN: I think you have to do that, because if you leave (a) as it is it is not specific enough; if you leave it out and just have (b), (c) and (d) you have really just got the status quo; and in either case you have not really done what you set out to do on page 11, which is to give this "brave new world" approach to the constitution.

MR. CALLAGHAN: Are we rejecting the possibility of any social programmes that have a national aspect; are we saying that there are no social programmes that the national government can control? Surely some of them will have implications far beyond provincial boundaries and should be controlled nationally. It strikes me the way we are writing it up it is pretty restrictive of any national participation. Is that a policy that has been ---

THE CHAIRMAN: Frank, your point makes me think, and Ed passed me a note to the same effect, that maybe we are going too fast here. Maybe what some Ontario view should do is set out the kind of discussion we have just had and say: "Here are the options, here are the problems with them, and here are the categories", which is a much more positive contribution than trying to lock ourselves into some narrow position in the beginning that we do

not yet understand. As you say, it raises all these questions.

PROFESSOR SYMONS: I think this would be a far more constructive approach for Ontario. The more I followed the discussion, it seemed to me there were implications that we were not having time to sort or identify.

THE CHAIRMAN: No.

PROFESSOR SYMONS: And I was really bothered by the kind of parochialism that was becoming pretty assertive there.

I think the kind of thing you suggest is far more helpful and is not giving anything away from Ontario's position. It is a constructive contribution.

THE CHAIRMAN: Well, we got the federal paper, and there is a very great danger of being stamped into a definitive conclusion next week for Canada, which I do not think Mr. Wishart or Mr. Robarts would be ready to do at this juncture; but we really should try to get out, in a way that the federal paper does not at all, the character of the choices and the options and the implications. By doing that, it will soon become very apparent by the discussion that there is a long, long way to go.

PROFESSOR SYMONS: You do a service even if we indicate that there are these things, because the federal paper goes down the line with such assurance and such a unilateral quality that it

seems to preclude this.

PROFESSOR BRADY: Mr. Chairman, looking at the thing in broad terms rather than concentrating upon the phraseology of your sections, surely what you are recognising here is what the federal people recognise too, although they express it differently: namely, in this area of social policy, social welfare, social security, and so on, you really have the two levels of government interested, and you have already a scheme or schemes where the two collaborate, and that this condition is one that is likely to continue for some time.

My impression is that the more flexibility you preserve in this relationship the better, because I think changes undoubtedly will occur in it as changes have occurred in the last twenty-five years. Whatever you do now, do not make it difficult to make adjustments, because I think in this whole realm of social life and the position of the individual in it and the protection of the individual in it, there are going to be great changes. Technology is bringing them about, and attitudes of mind and so on. The two levels of government, as it were, should be working together. That, I think, is the basic thing, that there should be collaboration and cooperation. Whatever phrasings you use, let us say, in the speeches next week, do not use phraseology that will make it difficult for such cooperative and collaborative measures.

Admittedly the difficulty is presented by Quebec's position, and Quebec will have to speak and will speak for itself because it has taken a position that neither Ontario nor any other province has taken, namely, that the social welfare field and so on is really within the sphere of culture, and that the province must have definitely a control over that. How Quebec is going to adjust to this scheme that the other provinces agree upon, if they agree upon it, I do not know, and that is another question. I do not think we can anticipate in what position we state, really, what Quebec ought to do or can do or will do. I think the basic fact is this really, that in this area of policy there has to be collaboration; there has been and will need to be in the future.

THE CHAIRMAN: I am conscious of the hour. and I think we must conclude. We have not completed the agenda, but we have completed the portion of the agenda which we have not been over before. I think if the Committee agrees on recommending to the Government of Ontario this kind of approach at this juncture in this paper, we can certainly take account of that very well in the next few days.

Just before we conclude this part of the meeting, I would like to suggest that members keep open the third Friday of January, the 16th, for a meeting. We will have some reconsideration of what

we have to do after the conference next week, and there is also a federal-provincial conference on non-constitutional matters planned for the 2nd, 3rd and 4th of February, which will be rather important, so that if you can keep Friday the 16th open we will see how we go along in the interim.

Everyone is welcome, as you know, to the dinner tonight with the Prime Minister.

---- The meeting adjourned at 5:50 p.m.

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